Supreme Court, U. S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

80-399

No.

IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH CONFORTE and SALLY CONFORTE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

QUESTIONS PRESENTED

1. Whether, in view of the declaration in the Judicial Conference's Code of Judicial Conduct that, "to the extent that any part of the enumerated statutes or Conference action is less restrictive than the Code, the latter will control", and the statement under Canon 3 that "a remittal of disqualification is not permitted under any circumstances", it was lawful for the courts below to spell out a waiver of the trial judge's apparent bias and prejudice after it had been found as a fact that his expressions "do raise reasonable doubts about his impartiality and do create at least an appearance of some bias against the defendant."

2. Whether, assuming that waiver of apparent judicial bias and prejudice under 28 U. S. C. §455(a) is still possible, there was "full disclosure on the record" by the trial judge, as required by 28 U. S. C. §455(e), of his strong negative personal feelings against the petitioner husband, feelings that necessarily vitiated the conviction of his jointly tried co-defendant, the petitioner wife.

3. Whether an absence of actual bias and prejudice on the part of the trial judge was properly found on the basis of the undisputed facts, as distinguished from the should-have-known inferences that were drawn from those undisputed facts by both courts below.

4. Whether judicial bias and prejudice can be asserted under 28 U. S. C. §455 even after an appeal has been taken, without incorporation of the timeliness requirement of 28 U. S. C. §144, as held by three other circuits, and also as twice held by the court below until one day before its opinion in the present case was filed.

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JOSEPH CONFORTE and SALLY CONFORTE, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 29, 1980. (There are no parties to this proceeding other than those named in the caption.)

OPINIONS BELOW.

The opinion of the court below (Appendix A(1), pp. A1-A25) has not yet been reported.* The opinion of Ferguson, D. J., on motion for new trial after remand because of asserted bias and prejudice on the part of the trial judge, Thompson, D. J. (App. A26-A59) is reported at 457 F.Supp. 641.

JURISDICTION.

The opinion of the court below affirming petitioners' convictions (App. B1) was entered on April 29, 1980. A timely petition for rehearing was denied and a suggestion for rehearing in banc was rejected on August 11, 1980 (App. B1). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

STATUTES AND CANONS OF THE CODE OF JUDICIAL CONDUCT INVOLVED.

The statutes and the Canons of the Code of Judicial Conduct involved are set forth at App. D1-D3.

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*As a matter of convenience, all of the Appendices to the present petition have been separately bound; they are cited herein as "App." with appropriate page number.

STATEMENT.

A. Summary of the Proceedings[1]

Petitioners, husband and wife, were indicted in the District of Nevada on a ten-count indictment alleging violation of 26 U. S. C. §7201, attempt to evade and defeat federal employment taxes (App. D2).

Waiving trial by jury, they were tried by Thompson, D. J., and found guilty on four counts. Petitioner Joseph Conforte was sentenced to five years' confinement on each count, the sentences to run consecutively — a total prison term aggregating 20 years — and to pay a fine of $40,000. Petitioner Sally Conforte was sentenced to four years' confinement, which was suspended; to five years' probation, the conditions of which are detailed below, p. 7; and also to pay a fine of $40,000. Both petitioners appealed.

While their appeal was pending in the court below, both filed a motion for new trial under 28 U. S. C. §455, disqualification of justice, judge, or magistrate (App. D1), alleging bias and prejudice on the part of Thompson, D. J., of which they had previously been unaware. The court below then remanded the case to the district court, Ferguson, D. J., of the Central District of California sitting by designation, to hear and determine that motion. Testimony was taken, including the deposition of Thompson, D. J., after which Judge Ferguson denied the motion (App. A26-A59; 457 F.Supp. 641); his grounds for decision are detailed below, pp. 10-12.

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[1]The case was decided below on an unprinted record. Apart from a few undisputed dates from the docket entries, we rely for every statement of fact made herein on the two opinions below (App. A1-A59), which we supplement only with excerpts from the testimony of Thompson, D. J., taken on deposition in connection with petitioners' motion for new trial, and cited herein as "Dep."

On appeal, the court below affirmed the convictions; rejected the claim of bias and prejudice; but set aside as illegal (a) the consecutive sentences imposed on petitioner Joseph Conforte; (b) the terms of probation imposed on petitioner Sally Conforte; and (c) all but one of the fines adjudged against each petitioner. (App. A1-A25.)

In *United States v. Sibla*, decided on March 3, 1980, the court below stated (App. C5) that "Section 455 does not require the filing of an affidavit with the judge, or even a motion for recusal; indeed, the question of recusal under that section may be raised for the first time on appeal." On April 28, 1980, that opinion was amended to strike out the foregoing declaration (*ibid.*); see App. C1-C9 for the *Sibla* opinion before and after amendment.

On the next day, April 29, 1980, the court below held in the present case that applications under 28 U. S. C. §455 were subject to the timeliness provisions of 28 U. S. C. §144 (App. D1-D2), as well as to the general rules governing motions for new trial on the ground of newly discovered evidence (App. A14-A16). A suggestion for rehearing in banc seeking intra-circuit clarification was rejected (App. B2).

The present petition is restricted to questions arising out of the disposition of petitioners' motion for new trial on the ground of bias and prejudice.

B. Instances of Judge Thompson's Asserted Bias and Prejudice.

1. The Bridge Club Letters (App. A34-A36).

Petitioner Joseph Conforte, an avid bridge player (App. A27), late in 1972 applied for membership in the Reno Unit of the American Contract Bridge League (hereafter simply "ACBL"), of which unit Judge Thompson was then president. When that application was received, it was discussed

at length by the unit's board of directors. Women directors objected because the applicant operated a house of prostitution, even though this was a legitimate business in the county where it was located.[2] During the discussion, Judge Thompson informed the board of applicant's felony convictions, for extortion in a Nevada court in 1960, and for a federal income tax violation shortly thereafter (App. A27); at the time of the discussion both convictions were more than ten years old.

"The consensus of the Board was that, if possible, Mr. Conforte's application to the Reno Unit should be rejected. As president, Judge Thompson was asked to write to the national organization for guidance on the procedure and the propriety of declining to accept Mr. Conforte as a member" (App. A34). On February 2, 1973, Judge Thompson wrote the national headquarters of the ACBL; this letter in its entirety appears at App. A35; here are the portions now pertinent:

> "Our by-laws prescribe 'good moral character' as a qualification for membership. The matter has been discussed by the Board of Directors of the Reno Unit and we do not wish to have Mr. Conforte as a member. At least, we do not wish to associate with him. Mr. Conforte has twice been convicted of felonies, extortion and income tax evasion and has served terms in federal and state penitentiaries. He is a notorious bawdy house keeper and is presently engaged in that business in nearby counties. There is nothing wrong or objectionable with his conduct at the bridge table. We understand he desires to participate in ACBL activities,

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[2]Under Nevada law, which provides for the licensing of such places outside of incorporated cities and towns, a house of prostitution no longer constitutes a nuisance *per se*. *Nye County v. Plankinton*, 94 Nev. 739, 587 P.2d 421 (1978).

particularly at regional and national tournaments, and recently played in the Hawaii Regional.

"I suppose there are a good many members floating around in ACBL who would not be acceptable associates for persons with moral scruples, but there is an obvious difference between regular association with an undesirable character in a small local unit and playing bridge against some stranger in a regional or national tournament."

On deposition in June 1978, Judge Thompson testified regarding his use of the word "notorious": "a notorious person is one who is thought of unfavorably" (Dep. 39).

On being advised by the general counsel to the ACBL that rejection of Joseph Conforte's application on the grounds stated appeared appropriate, a majority of the board then voted to deny him membership (App. A35-A36). "Again using his court stationery, Judge Thompson wrote to the defendant informing him of the decision of the Reno Unit and forwarding a check for $3 as a refund of the application fee. The rejection by the bridge club had a profound effect upon Mr. Conforte. He was very upset, and his pride was so hurt that he tore up the check and the letter from Judge Thompson and declined to tell any of his acquaintances about the incident" (App. A36).

2. The Football Cocktail Party (App. A36-A37).

"In the fall of 1973, the University of Nevada-Reno defeated the University of Nevada-Las Vegas in football. After the game there was a cocktail party at the home of one of the Reno assistant coaches who was the son of Judge Thompson's secretary. Judge and Mrs. Thompson attended, together with about fifty other guests. Also at the party was Mr. Roy Woofter who at the time was the district attorney for Clark County (Las Vegas), Nevada, and a good friend of Mr. Conforte. Mr. Woofter was with a group of four

other persons. At the party, a conversation took place between Mr. Woofter and Judge Thompson during which Mr. Conforte's name was mentioned" (App. A36).

The substance of the conversation, as found by the trier of facts on petitioners' motion for new trial, was that while one Scattini, the coach of the Reno team, was good, the team would be better if it had greater financial backing; and Joseph Conforte was mentioned as a possible contributor. Judge Thompson was and is strongly opposed to amateur athletics being supported by anyone in the business of running a house of prostitution (App. A36-A37).

Judge Thompson testified on deposition that he did not remember any discussion concerning coach Scattini or the U. of Nevada-Reno needing money for an athletic program; nor hearing any suggestion that, if money were needed, Joseph Conforte would be a good person to approach for a contribution; nor whether Joseph Conforte's name came into the discussion; nor saying that Joseph Conforte was not good for Reno (Dep. 17-18).

Three witnesses testified that Judge Thompson had said, in substance, "Joe Conforte should be run out of town because he was not good for Reno" (App. A37, note 5). On deposition Judge Thompson testified (Dep. 18, 19), "I don't believe that I would have said that he should be run out of town. * * * I have learned in law school that banishment was not the proper remedy."

On this conflicting testimony, the trier of facts found (App. A37) that, "In response to the comment that Mr. Conforte might contribute to the team, Judge Thompson made a statement to the effect that the only problem with coach Scattini was that he was a good friend of Mr. Conforte and that Mr. Conforte was 'not good for Reno.' "

Judge Ferguson found as a fact, see App. A59, that "it seems clear that Judge Thompson's expressions of his negative feelings about Mr. Conforte at the football cocktail party do raise reasonable doubts about his impartiality and do create at least an appearance of some bias against the defendant." (App. A46.)

3. Remarks During Petitioners' Sentencing (App. A30-A33)

Petitioner Joseph Conforte was sentenced to 20 years' confinement and to pay a $40,000 fine, while petitioner Sally Conforte was sentenced to pay a similar $40,000 fine, and to four years' confinement, suspended, plus five years' probation on condition that she never again file "Sullivan" tax returns — in which, because the taxpayer claims privilege against disclosure, he declares only his net income and tax due based on his own undisclosed computation of net worth, following *United States v. Sullivan*, 274 U.S. 259 (App. A31). As has been noted (*supra*, p. 3), the court below set aside as illegal 15 years of the confinement adjudged against Joseph Conforte, the probation conditions imposed on Sally Conforte, and all but one of the fines imposed on each (App. A21-A25).

Judge Thompson stated frankly that he was imposing sentences that "are unduly harsh and severe" because of his firm conviction that "Sullivan" returns were unlawful, even though he recognized "that these offenses with which these defendants have been convicted are not offenses for willful attempts to defeat and evade income taxes due," and even though he also recognized that, if petitioners were correct in deeming "Sullivan" returns to be lawful, then "if you do have a constitutional right to do that a portion of my sentence is going to be illegal". Judge Thompson took this position because "I do think it is important that we find out in the administration of the tax laws of this

country whether this type of position can properly be taken by taxpayers in the United States''. (App. 32, note.)

The full text of Judge Thompson's remarks during petitioners' sentencing is set forth in note 3 at App. A30-A33.

4. Judge Thompson's Deposition Testimony.

Here will be briefly noted portions of Judge Thompson's deposition testimony relevant to the issue of bias and prejudice, additional to that already adduced under (1) and (2) above.

Called by the prosecution, Judge Thompson testified that (Dep. 5) ''Ever since he [Joseph Conforte] was tried in the Washoe County District Court on either an extortion or blackmail charge — I don't remember exactly the character of the charge — and was convicted and sentenced to the Nevada State Penitentiary, I had the opinion that he was a man of bad moral character, and that was reinforced at the time of his conviction for income tax evasion.''

Judge Thompson further testified (Dep. 18-19), ''I believe that amateur athletics is a very sensitive area, and that it should not in any way become involved with, or supported by, people who are in rackets, so to speak; and at that time Mr. Conforte's business was that type of enterprise, even though it was lawfully conducted. And I think that if there was any discussion about accepting money or financial support from Mr. Conforte, that I would have been opposed to it.''

Judge Thompson testified that, at the time of petitioners' motion to waive a jury, see immediately below, ''My opinion was that I then thought, I still think, that he [Joseph Conforte] is a person of bad moral character'' (Dep. 19-20), an opinion based (Dep. 30) ''Primarily on his criminal record'' — which was also the opinion he held during the trial of the present case (*ibid.*).

Judge Thompson also testified (Dep. 34) that, at the time of the waiver of jury trial, he had never expressed in so many words that he thought that Joseph Conforte was not a person of good moral character, nor had he ever advised Sally Conforte or her attorneys of his opinion that her husband had bad moral character (Dep. 37).

The record shows that petitioners waived jury trial on August 5, 1977. Here is the final question to Judge Thompson on deposition (Dep. 40):

> "Q. Now, with respect to August of 1977, did you realize at that time, sir, that Mr. Conforte's convictions were almost well over ten years old and almost fifteen years old?
>
> "A. Sure. He has never done anything in the meantime to cause me to think that he had revised his activities or general approach to life."

C. Extent of Disclosure of Bias and Prejudice When Petitioners Waived Jury Trial.

The complete colloquy in connection with petitioners' waiver of jury trial appears at App. A28-A30, note 2; the portions presently pertinent are these (App. A29, note):

> "THE COURT: There is something else involved in this waiver of jury trial that should be brought out in the open. I am aware of Mr. Conforte's criminal record. Some years ago I passed upon a post-conviction remedy motion that was filed on behalf of Mr. Conforte. I am aware of two trials in this court which involved Mr. Conforte, one in which I believe he was charged with a violation of the White Slave Traffic Act, and another which involved an effort to abate the operation of the so-called Mustang Ranch for Internal Revenue violations.
>
> "Facts of that nature, if known to a juror prior to impanelment of the jury, would be a basis for dis-

> qualification of a juror. If I am going to be the trier of the facts in this case, I can't eliminate the knowledge I already have. So I want you to know — and you know what I know — that if I am to preside over this trial without a jury, you will have to waive any basis of disqualification because of my prior knowledge of facts concerning Mr. Conforte primarily; I don't know much about Mrs. Conforte."

Judge Ferguson found as a fact that (App. A44), "With respect to the cocktail party statements, it appears from the evidence that the defendants and their counsel were not aware of the facts prior to the trial of this case."

Judge Ferguson further found as a fact (App. A45) that "There is no question that, at the time of their extensive pretrial discussions concerning the advisability of waiving a jury, the defendants' counsel were unaware of the bridge club incident."

But, Judge Ferguson went on to say (*ibid.*), "However, Mr. Conforte was aware of it. He may not have known specifically of the letter which Judge Thompson wrote to the bridge league, but he knew three years before the trial, and vividly remembers it today, that Judge Thompson informed him that he was not wanted as a member of the Reno unit."

D. Bases of the Rulings Below Rejecting Petitioners' Contentions of Bias and Prejudice.

The holdings of Ferguson, D. J., and of the court below on the questions presented by this petition may be summarized as follows:

1. With respect to the contention that the provisions of the Code of Judicial Conduct precluded waiver of the apparent bias and prejudice found to exist, Judge Ferguson held those provisions not governing, and also that they could

not be invoked after conviction (App. A49-A50). The court below made no mention of the Code of Judicial Conduct.

2. With respect to the contention that, if waiver of apparent bias was possible under 28 U. S. C. §455(e) (App. D1), there was no full disclosure here, Judge Ferguson held that Judge Thompson could not have been expected to disclose the cocktail party conversation, which he said he did not remember, and then held that since petitioner Joseph Conforte knew he had been rejected for membership in the Reno unit of which Judge Thompson was president, he must be held to have had knowledge of Judge Thompson's feelings about him, even though (App. A45) "He may not have known specifically of the letter which Judge Thompson wrote to the bridge league."

The court below held (App. A15) that "The rejection letter put Conforte on notice that Judge Thompson had had at least some involvement with the decision to reject his application to the American Contract Bridge League, although concededly Conforte did not know the tenor of the correspondence."

Accordingly, both Judge Ferguson (App. A45-A48) and the court below (App. A20) held that Joseph Conforte had waived any apparent bias and prejudice on the part of Judge Thompson resulting from the bridge club letter.

3. With respect to the contention that, on the undisputed facts, there was actual bias and prejudice on Judge Thompson's part, Judge Ferguson, while finding as a fact that (App. A53) "There is no question that Judge Thompson holds, and held at the time of the trial of this case, a negative opinion about the defendant Joseph Conforte", none the less decided that, on the entire record, this "negative opinion" did not amount to actual bias and prejudice within 28 U. S. C. §455(b) (App. D1). From this it followed (App.

A51-A56) that petitioners' waiver of their right to a jury trial was knowingly made.

The court below held that (App. A19), on the whole record, "nothing in Judge Thompson's remarks indicates a disqualification to hear the case", and, further (App. A20), that "Appellants' waiver of a jury trial was knowing and intelligent and was therefore valid."

4. With respect to the contention that petitioners were free to raise their objections on the ground of bias and prejudice on appeal, the court below held (App. A15-A16) that petitioners' motion for new trial was untimely because the assertedly new evidence could with diligence have been discovered earlier. The court below went on to hold (App. A14-A16) that grounds for recusal cannot be raised for the first time on appeal.

REASONS FOR GRANTING THE WRIT.

If we start with the basic premise that "justice must satisfy the appearance of justice" (*Offutt v. United States*, 348 U. S. 11, 14), then this is indeed a deeply disturbing case.

For, granting that Judge Thompson acquitted petitioners on six of the ten counts in the indictment, that in other proceedings he had ruled favorably to petitioner Joseph Conforte, and that significant portions of the sentences imposed on both petitioners by Judge Thompson were set aside by the court below because illegal, a profoundly troubling residue of demonstrable bias is still conspicuously apparent.

(a) Here, in the face of a finding (App. A46) of apparent bias on Judge Thompson's part, the Judicial Conference's Code of Judicial Conduct, which would have precluded waiver of that disqualification, was simply brushed aside. (b) Here both courts below erroneously assumed that a mere notice rejecting Joseph Conforte's membership in a bridge club charged him with notice of another and highly derogatory communication that admittedly he never saw. (c) Here the basic concept of "personal bias and prejudice" has been trivialized by being characterized as merely "negative feelings" (App. A46), "negative views" (App. A48), or "a negative opinion" (App. A53). (d) Here both courts below imposed a timeliness factor on 28 U. S. C. §455, in the face of the Congressional rejection of the Department of Justice's proposal that a timeliness provision be included in that section. And (e) this case emphasizes in sharp relief the ongoing conflict between circuits as to whether timeliness is indeed applicable under §455, conflict compounded into chaos in the court below, which has ruled both ways on the point, not only in this case but also in another, and then declined to clarify its divergences.

First. Judge Ferguson, ruling on the motion for a new trial based on Judge Thompson's asserted bias and prejudice, found as a fact (App. A46) that the latter's expressions "do raise reasonable doubts about his impartiality and do create at least an appearance of some bias against the defendant." This, without question, is a finding of apparent bias and prejudice under 28 U. S. C. §455(a) (App. D1), which under §455(e) (*ibid.*) can only be waived if there has been "a full disclosure on the record".

The Judicial Conference's Code of Judicial Conduct, however, states that "to the extent that any part of the enumerated statutes or Conference action is less restrictive than the Code, the latter will control" (69 F. R. D. 273; App. D3), and since 1975 that Code's Canon 3 has been revised so that "a remittal of disqualification is not permitted under any circumstances" (69 F. R. D. 279; App. D3). Judge Ferguson held, however, that the Code of Judicial Conduct did not impose a mandatory duty, and also that the Code could not be invoked after petitioners' convictions (App. A49-A50). The court below did not even deign to mention the Code.[3]

If the Judicial Conference's Code of Judicial Conduct, under which Canon 3 is silent about timeliness, is to be given effect according to its terms, it follows that the apparent bias and prejudice found by the trier of facts cannot be waived. On that footing, the judgment below must be reversed without more, rendering it unnecessary to consider

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[3]In *Bradley v. Milliken*, 620 F.2d 1143, 1157-58, the Sixth Circuit considered the applicability of Canon 3 A(4) of the Code of Judicial Conduct, and concluded that its provisions had not been violated. While this treatment differs diametrically from that accorded to the Code of Judicial Conduct by Judge Ferguson and the Ninth Circuit in the present case, we are not prepared to assert that the resultant difference in approach is fully equivalent to the conflict of decision envisioned by this Court's Rule 17.1(a).

any other question raised by the present petition. Consequently the first, and, it may be, the controlling issue in this case concerns the effect to be given the Code of Judicial Conduct in litigation.

The rulings below amount to holding that the Code of Judicial Conduct is no more to be regarded, or respected, than the usual postprandial bar association effusion, sweet-scented, high-sounding, but without the slightest operative effect in a harsh world inhabited by real people, and that accordingly it may not be invoked by actual litigants. If that is indeed the weight properly to be given to the Code of Judicial Conduct, this Court should so state.

We think, however, that the Code has more force than was accorded to it below. Congress created the Judicial Conference, *inter alia*, to "advise * * * as to any matters in respect of which the administration of justice in the courts of the United States may be improved" (28 U. S. C. §331). Pursuant to that mandate, the Judicial Conference promulgated a Code of Judicial Conduct under which there can be no waiver once judicial disqualification appears (*supra*, p. 14). We think that the Judicial Conference meant what it said, and we submit that the courts are as much bound by its promulgations as an executive department is by its own published regulations. *E.g.*, *Service v. Dulles*, 354 U. S. 363.

If we are right, then the finding of apparent bias and prejudice on Judge Thompson's part cannot be waived, and hence becomes dispositive. We urge the Court to declare the controlling effect of the Code of Judicial Conduct, in terms that can never again be misunderstood.

Second. But even if we assume, contrary to the foregoing, that the less restrictive statutes control, then it is clear that apparent bias and prejudice under 28 U. S. C. §455(a) can

be waived if, as §455(e) declares, there has been "a full disclosure on the record of the basis for disqualification" (App. D1).

1. Plainly, no such full disclosure was made here; Judge Thompson's mention at the hearing on jury waiver of his knowledge of Joseph Conforte's prior criminal convictions, both of them more than 15 years back, was far from disclosing his own strong adverse view that "he was an undesirable character" (App. A35, note ....), that he was "not good for Reno" (App. A37), that he was "one who is in rackets, so to speak, * * * even though it was legally conducted" (Dep. 18-19), that "he was a man of bad moral character" (Dep. 5), and that (Dep. 40) "he has never done anything in the meantime to cause me to think that he had revised his activities or general approach to life."

All too clearly, there was no "full disclosure on the record", either of those sentiments, or of the ACBL letter, or of the cocktail party remarks. The two latter incidents were not known to counsel (App. A44, A45), whose advice on waiving or not waiving a jury would of course be controlling. It is likewise hardly disputed that Joseph Conforte never saw Judge Thompson's ACBL letter (App. A15, A45; *supra*, p. 11).

2. The pervasive error infecting the present proceedings was the assumption of both courts below that the letter notifying Joseph Conforte of his rejection for membership, which was signed by Judge Thompson in his representative capacity as president of the Reno unit, somehow put its recipient on notice of the plainly derogatory remarks that the writer had earlier made about him in his communication to the ACBL (App. A15, A45).

We think it would be impossible for anyone not a clairvoyant to infer, from the simple notification giving no rea-

sons that was made in a representative capacity, the actively hostile views that Judge Thompson actually entertained about Joseph Conforte and that he articulated in his letter to the ACBL.

The matter can easily be tested. Suppose a motion made under 28 U. S. C. §144 (App. D1-D2) to disqualify Judge Thompson in advance of trial had been made on the basis of the rejection letter; could the moving party possibly have contended with the slightest degree of success that the rejection letter established personal bias and prejudice? Obviously not; and if that motion had been heard by a judge other than Judge Thompson the latter's feelings as set forth in his ACBL letter could not possibly have been apparent to such other judge.

3. Nor is it possible to excuse Judge Thompson's failure to mention the cocktail party incident because of the (App. A48) "impossible task of recalling and reciting every incident or factual detail which might contribute to the overall impression of partiality."[10]

For, notwithstanding the comment in the foregoing footnote, Judge Ferguson significantly set aside Judge Thompson's complete *non mi ricordo* (IIIA Wigmore, *Evidence* (Chadbourn rev. 1970) §995, p. 933) concerning the cocktail party. Judge Ferguson's findings on that matter (App. A36-A37) show that he split the difference: He found it had actually happened, despite Judge Thompson's asserted total lack of memory about the incident; and he then rejected the testimony that Judge Thompson had said that Joseph Conforte "should be run out of town", even though Judge

---

[10][Footnote in original] "Such a requirement would be completely unrealistic. Indeed, in the instant case it would have been impossible for Judge Thompson to disclose to the defendants the facts regarding his cocktail party statements because he did not, and does not now, have any memory of that conversation about Mr. Conforte."

Thompson's denial — "I have learned in law school that banishment was not the proper remedy" (Dep. 19) — falls somewhat short of being entirely persuasive.

4. The basic question is whether, all the facts considered, Judge Thompson in fact made "a full disclosure on the record" as required by §455(e) when he told petitioners as they sought to waive jury trial only that (App. A29, note; *supra*, pp. 9-10) he was aware of three of Joseph Conforte's prior brushes with the law, in one of which an acquittal resulted, but said nothing of his own deep personal animus against Joseph Conforte, animus that is reflected in his ACBL letter, in his cocktail party remarks that Judge Ferguson found him to have made, and, preeminently, in his deposition testimony (*supra*, pp. 8-9).

Plainly, Judge Thompson's apparent bias and prejudice was never waived in the manner required by §455(e).

Third. The foregoing fundamental error as to Joseph Conforte necessarily carries over to, and therefore vitiates, the conviction of his wife, petitioner Sally Conforte -- even though, as Judge Ferguson found (App. A26, note), "There is no evidence whatsoever that Judge Thompson had any preconceived personal opinion about or bias against Mrs. Conforte."

For the law is clear that, when a U. S. District Judge improperly fails to recuse himself for personal bias and prejudice against some defendants being jointly tried, the resultant convictions cannot be fractionalized so that they can be sustained against the others.

The controlling authority here is *Berger v. United States*, 255 U. S. 22. There the district judge, presiding over the trial of an Espionage Act indictment returned during the pendency of the First World War, was shown to have had a deep-seated bias against all Germans and all German-

Americans. This affected defendant Germer, born in Germany; defendant Kruse, of immediate German extraction; and defendant Berger, born in Austria, which was allied with Germany and was by then at war with the United States. Their co-defendants were Engdahl, nativity not indicated but doubtless Scandinavian or Scandinavian-American; plus one, Irwin St. John Tucker, who very obviously was untouched by even the tiniest Teutonic taint. Yet Engdahl and Tucker had the benefit of the ruling that the judge had "a bent of mind that may prevent or impede impartiality of judgment" (255 U. S. at 33-34; see proceedings on remand, *Berger v. United States*, 275 Fed. 1021 [C. A. 7]).

Similarly here: If, as we urge, the judgment must be reversed for bias and prejudice against Joseph Conforte, that reversal would necessarily include the conviction of his wife, petitioner Sally Conforte, who was a co-defendant and was jointly tried with her husband.

Fourth. On the contention that there was actual bias and prejudice under 28 U. S. C. §455(b)(1) (App. D1), as to which even the statute permits no waiver, we think that this was clearly established by the totality of the feelings shown to have been entertained by Judge Thompson about Joseph Conforte; and we are also of the view that the courts below, by trivializing each single tree, erroneously denied the obvious existence of the forest.

1. Neither Judge Ferguson nor the court below undertook to suggest that the ACBL letter (*supra*, pp. 4-5) did not reflect personal bias and prejudice. Rather, both took the view that Joseph Conforte, upon receiving the membership rejection letter, should have known of the adverse views expressed about him by Judge Thompson in the earlier ACBL communication, admittedly never seen (App. A15, A45). We have already demonstrated the fallacy of that suggestion, especially in the light of what §144 would have

required (*supra*, p. 17); there is no need for repetition here.

2. The attempted distinction (App. A51-A56; cf. App. A18-A20) between bias that rests on matter learned by a judge sitting judicially and information obtained while off the bench, is, we submit, wholly unhelpful. The test is not the source of information, it is whether the judge's "bent of mind" (*Berger v. United States*, 255 U. S. at 33-34, *supra*) precludes impartiality. In undertaking that inquiry as to state of mind, the asserted dichotomy between "judicial" and "personal" is of little use, and indeed one circuit has expressly rejected it. *Rice v. McKenzie*, 581 F.2d 1114, 1117-18 (C. A. 4).

In the present case it is plain from the entire record that Judge Thompson's feelings towards Joseph Conforte were those of disapproval amounting to hostility. After all, both of the prior convictions repeatedly relied on by Judge Thompson were 15 or more years old — and Rule 609(b) of the Federal Rules of Evidence forbids the use, even to attack a witness's credibility, of convictions more than 10 years old.

Those feelings of hostility cannot be sugar-coated or euphemized away by being downgraded to "negative feelings" (App. A46), "negative views" (App. A48), or "a negative opinion" (App. A53). For, very plainly, when a judge's "negative" expressions are to the effect that a defendant whom he is about to try is "an undesirable character", is "not good for Reno", is a "person of bad moral character", and is "one who is in rackets, so to speak" (*supra*, pp. 5, 6, 8), then those "negative feelings" and "negative views" are identical with and quite indistinguishable from the "personal bias and prejudice" against which §455 protects.

3. The rulings below were also clearly wrong in refusing to hold that the excessive sentence imposed was not evidence of bias and prejudice.

We do not question Judge Ferguson's abstract proposition (App. A42) that "The severity of a sentence, if within the statutory limits, cannot support a claim of personal bias." But the court below set aside as illegal portions of the sentences imposed on both petitioners, thus necessarily holding that the sentences imposed were not within statutory limits.

Judge Thompson himself recognized (a) that the sentences imposed might be illegal (App. A32, note), and (b) that they were being imposed in an employment tax case because of his strong disagreement with petitioners as to the legality of their income tax returns (*ibid.*).

On deposition, Judge Thompson made it abundantly clear that he has always considered Joseph Conforte to be a bad man (*supra*, p. 8, 9). That deposition was taken on June 6, 1978; the sentences were imposed on October 28, 1977. Obviously, Judge Thompson's feelings in June 1978 are evidence of how he had felt less than eight months earlier (II Wigmore, *Evidence* [Chadbourn rev. 1979] §396, pp. 439, 442).

The savage 20-year sentence imposed on Joseph Conforte here, which was properly held below to have been illegal, thus constitutes convincing evidence of Judge Thompson's personal bias and prejudice. Cf. *United States v. Thompson*, 483 F.2d 527, 529 (C. A. 3). Indeed, the obvious relationship between Judge Thompson's hostile feelings and the imposition of sentences that he himself admitted (App. A32, note) "are unduly harsh and severe" seems to us so very plain that we feel justified in invoking Chief Justice Taft: "All others can see and understand this. How can we prop-

erly shut our minds to it?'' (*Child Labor Tax Case*, 259 U. S. 20, 37).

4. In the event that the issue of actual bias needs to be reached, we submit that this Court is free to make an independent examination of the undisputed facts: The bridge club letter, the cocktail party conversation as found by the trier of facts, Judge Thompson's remarks at sentencing, and his deposition testimony about his feelings towards Joseph Conforte.

The ''concurrent findings'' rule does not preclude such a course, for two reasons. First, that rule as generally phrased is invariably subject to a ''clearly erroneous''/ ''plainly without support'' exception; see the mass of cases collected in the *L. ed. Digest of Supreme Court Reports* at Appeal §1506; there is no need to cite even representative examples here. Second, this case is essentially an instance of facts intermingled with standards of law, where a different scope of review is appropriate. As the Court said in *Offutt v. United States*, 348 U. S. 11, 14:

> ''That great weight is to be given to the findings of fact by the two lower courts is a rule of wisdom in the exercise of the reviewing power of this Court. But in the enforcement of the rule it is important to discriminate between more or less subordinate facts leading to a judgment of their legal significance, and a conclusion — though concurred in by two courts — that may in fact imply a standard of law on which judgment on the case in its entirety is based. *Baumgartner v. United States*, 322 U. S. 665, 670-671; *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 403-404.''

The present case with its need to weigh judicial conduct is in that respect precisely on all fours with that of *Offutt*.

Fifth. The ruling below as to untimeliness is contrary to those in three other circuits, and is moreover demonstrably at variance with the intention of Congress in enacting 28 U. S. C. §455.

When the Department of Justice reported on the bill that became §455, it said (H. R. Rep. No. 93-1453, 93d Cong., 2d sess., p. 9; 3 U. S. Code Cong. & Ad. News [1974] 6351, 6358):

> "S. 1064 represents a salutary advance in the development of the administration of justice. However, consideration should be given to adding a provision such as is embodied in 28 U. S. C. 144 to assure that applications for disqualification shall be timely made so as to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before."

With that communication and the terms of 28 U. S. C. §144 before it, Congress enacted 28 U. S. C. §455 without any time limit of any kind. Accordingly, the Seventh Circuit held that disqualification could be enforced at any time, in that instance by mandamus (*SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117). The Sixth Circuit similarly holds that the matter can be raised on appeal (*United States v. Amerine*, 411 F.2d 1130). And the Fifth Circuit has at least three rulings to the same effect in varying factual settings. See *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, cert. den., 425 U. S. 944; *United States v. Brown*, 539 F.2d 467; *Potashnik v. Port City Const. Co.*, 609 F.2d 1101.

Contrariwise, the Second Circuit in an extreme case on the facts imposed the §144 time limit (*In re International Business Machines Corp.*, 618 F.2d 923), while further confusion appears in a Third Circuit decision, *United States v. Schreiber*, 599 F.2d 534, cert. den., 444 U. S. 843,

which suggests that contentions under §455 must qualify as "plain error" to receive appellate consideration.

The court below first followed the majority view in the present case when, after the appeals from conviction had been perfected, it remanded the cause to Judge Ferguson to hear and determine the contentions made in petitioners' motion for new trial.

Consistent with that determination, the court below on March 3, 1980, specifically declared in *United States v. Sibla* that §455 could be invoked even on appeal (App. C5). But, on April 28, it amended its *Sibla* opinion to strike that passage (App. C5 and note 2), and then, on the very next day, held in the present case that §455 was not available except under the conditions imposed on motions for new trial alleging newly discovered evidence relating to guilt or innocence (App. A14-A15).

Mindful of the need for a court of appeals to resolve its own intra-circuit conflicts, see *Wisniewski v. United States*, 353 U. S. 901, petitioners coupled with their petition for rehearing below a suggestion for rehearing in banc. But the opportunity thus proffered for elucidation of the contradictions just noted was declined. (App. B1).

The legislative history of §455 makes it abundantly clear that the later expressions of the court below in this case and in *Sibla* as amended were wrong, and that the Fifth, Sixth, and Seventh Circuits were right. The terms of §455 plainly show that Congress never intended to impose a timetable on any accused's "right to have an impartial judge" (*Tumey v. Ohio*, 273 U. S. 510, 535). To the contrary — and here we return to our starting point — Congress legislated to give effect to the immutable fundamental that "justice must satisfy the appearance of justice" (*Offutt v. United States*, 348 U. S. 11, 14).

CONCLUSION.

The question of the effect if any to be given the Code of Judicial Conduct in cases of asserted judicial disqualification, and the conflicting and confused state of the authorities as to the timeliness of proceedings invoking 28 U. S. C. §455 in such cases, urgently call for resolution by this Court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Of Counsel

Dated: SEPTEMBER 1980

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1980.

Supreme Court, U. S.
FILED
SEP 12 1980
EDWARD RODAK, JR., CLERK

No. 80-399

IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH CONFORTE and SALLY CONFORTE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI.

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APPENDIX A.

Opinions Below.

1. Opinion of the Court Below.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Joseph Conforte and Sally Conforte, Defendants-Appellants. Nos. 77-3956, 78-3310.

Filed: April 29, 1980.

Appeal from the United States District Court for the District of Nevada.

Before, KENNEDY and TANG, Circuit Judges, and PALMIERI,* District Judge.

KENNEDY, Circuit Judge, This is an appeal from a judgment of conviction in a tax evasion case. The appellants, Joseph and Sally Conforte, are the operators of an establishment called "Mustang Ranch," described in the record as a legalized house of prostitution located in Nevada. The Confortes were convicted on four separate violations of 26 U.S.C. §7201 for willful acts taken to evade or defeat federal employment taxes for the last quarter of 1974 and the first three quarters of 1975. The Government's case was that the appellants willfully failed to file employment tax returns, to withhold income taxes, or to pay employment taxes for certain employees who worked at the Mustang Ranch establishment. The employees in question were not prostitutes but were so-called auxiliary personnel such as maids, bartenders, security guards, and cashiers. The district court tried the case without a jury. We agree with the trial court that the Government established that appellants' failure to file employment tax returns for these auxiliary personnel was flagrant, and part of a willful scheme to evade federal taxes on a substantial scale. We therefore affirm the convictions.

---

*Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

I.

Conviction for Tax Evasion.

Conviction under section 7201 requires proof beyond a reasonable doubt of each of the following elements: (1) the existence of a tax deficiency; (2) willfulness; and (3) an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Lawn v. United States*, 355 U.S. 339 (1958); *Holland v. United States*, 348 U.S. 121 (1954); *Spies v. United States*, 317 U.S. 492 (1943). Appellants contend that the employers had no obligation to withhold income taxes or pay Social Security taxes since the auxiliary personnel received no salary, but only tips from the prostitutes. They argue, moreover, that even if the compensation is classified in law as a wage, the appellants believed it to be tips, so the failure to file was not willful. As part of the defense that there was no willful criminal conduct, the appellants claim that they were relying upon their tax counsel's negotiations with the Internal Revenue Service, negotiations which continued during the quarterly tax periods in which the violations occurred. We reject these contentions and conclude that the Government has met its burden of proof on each element.

A. Tax Deficiencies.

As even the Confortes' counsel conceded from the outset of trial, the auxiliary personnel in question were employees, not independent contractors. The argument that withholding was not required thus turns upon whether the employees received wages, as distinct from tips. An examination of the compensation procedures used at the brothel leaves us with little doubt that the term "tip" is entirely inaccurate to describe the compensation paid to the auxiliary employees. The compensation paid to the auxiliary employees

would be defined as a wage by lay people and tax experts alike.

The system used to pay the Mustang Ranch employees during the four tax quarters in question was this: An employee designated as a cashier took all the monies earned by the prostitutes. The cashier returned to them one-half of their earnings for each shift, less ten percent. If the prostitute earned less than $50.00, no money was deducted from her half share. No money was taken from that portion of the prostitute's earnings in excess of $100.00. The ten percent deduction was designated a "board fee," and the total board fees so retained were denominated by the Confortes as a "tip fund." At the end of each day or night shift the cashier paid both the prostitutes and the auxiliary employees, the cashier herself being included in this latter category. The cash payments to the auxiliary employees were said to be taken from the "tip fund." Apparently, there was no physical separation of the cash in the drawer, the "tip fund" constituting simply an accounting designation. The compensation to auxiliary employees from the "tip fund" was a fixed payment per shift, such as $30.00 for a maid and $35.00 for a security guard. If the "tip fund" was insufficient for payment, Joseph Conforte would put more cash in the drawer. Any funds remaining in the drawer after these payments were, of course, retained by the Confortes. The prostitutes kept track of their earnings, typically on index cards, and the cashier made certain summaries on binder paper or lined yellow paper. These records were routinely burned, as discussed further below.

The Conforte's argument that the employees received tips and not wages is so far removed from the economic facts of the case that the term "tip fund" used by the Confortes is itself a factor tending to show a willful attempt to evade taxes. The trial judge expressly so found, and we agree. The funds paid the auxiliaries were wages as that term is

defined in 26 U.S.C. §§3121, 3401. *See United States v. Fleming*, 293 F.2d 953 (5th Cir. 1961).

To begin with, the employers were the Confortes, not the prostitutes. The Confortes supervised the employees and exercised authority over hiring and firing. The employees who testified said they considered the Confortes to be their bosses. The Confortes set the rates of compensation. A necessary inference from the record is that the "tip fund" was sometimes in excess of the amounts required for the auxiliary personnel and that sometimes it was insufficient. It was in the latter instances that Joseph Conforte put additional funds in the cash drawer. There is no evidence whatever that the prostitutes set the auxiliaries' pay, or even that they knew the amount. There is no evidence they had any control over the auxiliaries. The Confortes, in short, had complete control over the auxiliaries, their rate of pay, hours, working conditions, and term of employment. For a set hourly period, the auxiliaries were paid fixed sums, which had a direct relationship to the value of the services they performed. These sums were paid from the Confortes' gross revenue and from funds which the Confortes put in the cash drawer. These sums were wages paid by the employers, and the employers were the Confortes. *See United States v. Silk*, 331 U.S. 704, 716-19 (1947); *McCormick v. United States*, 531 F.2d 554 (Ct. Cl. 1976); *N.L.R.B. v. Nello Pistoresi & Son*, 500 F.2d 399, 400 (9th Cir. 1974); *Humble Pipe Line Co. v. United States*, 442 F.2d 1353, 1356 (Ct. Cl. 1971); *McGuire v. United States*, 349 F.2d 644 (9th Cir. 1965); *Fahs v. Tree-Gold Co-Op Growers of Florida*, 166 F.2d 40 (5th Cir. 1948).

While there are some cases in which the distinction between tips and wages must be defined with some precision, a rudimentary requirement is that a tip is a payment made

by a person who has received a personal service. *Roberts v. Commissioner*, 176 F.2d 221, 225 (9th Cir. 1949); *Olk v. United States*, 388 F.Supp. 1108, 1111 (D. Nev. 1975), *rev'd on other grounds*, 536 F.2d 876 (9th Cir.), *cert. denied*, 429 U.S. 920 (1976). Since the Confortes, not the prostitutes, set the fee, made the payments and received the services, that element is absent here. A second essential element is that the tip be a voluntary payment in an amount, and to a person, designated by the customer. *Restaurants and Patisseries Longchamps, Inc. v. Pedrick*, 52 F.Supp. 174, 174-75 (S.D.N.Y. 1943); 8A J. Mertins, The Law of Federal Income Taxation §47A.04 (1978). This element is also absent; contributions from the prostitutes were mandatory. The auxiliary services were rendered to the establishment as an enterprise, not to the prostitutes individually. The scope of duties performed by the auxiliary personnel were sufficiently broad so that a base rate of pay from the establishment, not tips, is the normal method of compensation, and that was the compensation plan adopted by the Confortes. This holding is consistent with rulings issued by the Treasury Department in characterizing income as wages rather than tips where services are rendered to the enterprise as a whole, and not to individuals who allegedly receive the service. *See* Rev. Rul. 69-28, 1969-1, C.B. 270-71; Rev. Rul. 145, 1937-1 C.B. 443; Rev. Rul. 301, 1938-1 C.B. 455; Rev. Rul. 69-28, 1969-1 C.B. 270; Rev. Rul. 75-400, 1975-2 C.B. 464; Rev. Rul. 76-231, 1976-1 C.B. 378.

The record contains a further refutation of the argument that the base compensation paid to the employees consisted of tips, in that occasionally auxiliary employees would do personal errands for the prostitutes and would receive true gratuities for those services. These sums were tips, and

since contra-distinct from the employees' base pay, the difference in the two sums is clearly revealed. A final factor to establish that the base amounts paid to the auxiliary personnel from the board fund were wages, rather than tips, is that various of the service personnel were paid their salary from the "tip fund" while on vacation, notwithstanding their absence from work. Such vacation allowances constitute wages, not tips. *See* 26 C.F.R. §31.3306(b)-1(g). We conclude that the Government has established beyond a reasonable doubt that employment taxes were due and that withholding was required for the quarters in question.

B. Willfulness.

Willfulness requires a showing of specific wrongful intent to avoid a known legal duty. *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 46 (1973); *United States v. Hawk*, 497 F.2d 365, 366-69 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974). It is a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the Government which he seeks to avoid. *United States v. Martel*, 199 F.2d 670, 672 (3rd Cir. 1952). This element was proven beyond a reasonable doubt.

The Confortes argue that the failure to report wages, even if a violation of the Revenue Code, was not willful because the distinction between tips and wages is a difficult one to make. We have already indicated that complexities or the necessity for fine distinctions are not required to be made in this case. *See United States v. Buckner*, No. 78-1319 (9th Cir. Dec. 28, 1979). The Confortes were not strangers to federal tax requirements for employers. During the tax periods here in question, Sally Conforte filed employment tax returns for a restaurant of which she and Joseph Conforte were the proprietors. There were, moreover, numerous other

acts shown from which it is proper to infer a willful plan to defraud the Government.

Direct proof of a taxpayer's intent to evade taxes is rarely available. Willfulness may be inferred, however, by the trier of fact from all the facts and circumstances of the attempted understatement of tax. In *Spies v. United States*, 317 U.S. 492 (1943), the Supreme Court listed some circumstances from which willfulness may be inferred:

> keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books and records, concealment of assets or covering sources of income, handling one's affairs to avoid making the records used in transactions of the kind, and any conduct the likely effect of which would be to mislead or conceal.

Id. at 499. *See also Smith v. United States*, 348 U.S. 147, 159 (1954) (extensive use of currency and cashier's checks to satisfy obligations); *Holland v. United States*, 348 U.S. 121 (1954) (pattern of understatement of income in successive years); *United States v. Murdock*, 290 U.S. 389, 395 (1933) (use of memory, surmise, estimates, or a careless disregard in making of tax returns); *United States v. Fahey*, 510 F.2d 302 (2d Cir. 1974) (taxpayer's effort not to learn what his tax obligations are); *Warring v. United States*, 222 F.2d 906, 909 (4th Cir.), *cert. denied*, 350 U.S. 861 (1955) (presence of large sums of money in cash not deposited in a bank highly suspicious).

The Confortes conducted an operation at the Mustang Ranch that is consistent with almost no other inference but an intent to defraud the Government of its taxes. The receipts and payments for virtually all of the expenses for the Mustang Ranch operation were handled in cash. Some idea of the size and sophistication of the operation may be gathered from the fact that the license fee for the brothel (paid to the

sheriff in cash) was initially $25,000 per year, later increased to $30,000 per year. The employees were paid daily in cash. There was evidence, expressly credited by the district court, that the employees were told by the Confortes not to report their wages. More than twenty employees testified, and of these only two apparently reported their wages to the Government. Using assumptions that would state the employment taxes due for the quarters here in question at a minimum, the Government's expert witness testified that there was a failure to withhold over $54,000 in federal employment taxes.

It was a regular practice, testified to by five witnesses who were themselves responsible for carrying it out, for appellants to burn the records showing what the prostitutes earned and the summary sheets showing what was paid to the auxiliary employees. Testimony indicated that Joseph Conforte himself had delivered records to the security men to be burned. This was so even though other refuse was hauled away from the premises. These acts of burning are affirmative acts constituting an attempted evasion of the tax. Appellants argue that the records were burned openly on the premises; but even assuming, contrary to the evidence, that the precise nature of the burning operation was widely observed and understood, the act would be as consistent with knowing destruction of records as it was with innocence, and the trial judge found, properly in our view, that it was the former.

C. Reliance on Advice of Counsel.

Our cases establish that reliance on advice of counsel in tax evasion cases is not a complete defense, but only a circumstance indicating good faith which the trier of fact is allowed to consider on the issue of willfulness. *United States v. Crum*, 529 F.2d 1380, 1383 (9th Cir. 1976); *see Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961).

The indicia of willfulness set forth above are sufficient in themselves to demonstrate that the appellants' allegation of reliance on advice of counsel or on representations made by the IRS, is not a claim made in good faith, but because counsel contend vigorously on appeal that the Confortes and their tax attorney were misled we address that argument separately.

In October and November, 1972 the Internal Revenue Service sent a determination letter to about twenty-five brothel operators in the State of Nevada. Such a letter was sent to the Confortes on November 9, 1972. The letter stated in part:

> The Internal Revenue Service has recently completed an examination of the organized houses of prostitution throughout the State of Nevada. It has been determined that you are an employer, as defined in the Internal Revenue Code, Section 3401(d) and Treasury Regulations Section 31.3306(i)-1(b)-1(d) and, therefore, subject to the laws and regulations pertaining to Withholding Tax and Federal Insurance Contribution Act taxes.
>
> . . . .
>
> Consequently, beginning with the fourth quarter 1972, you will be required to file Form 941, "Employer's Quarterly Federal Tax Return", including Withholding and Social Security taxes on all prostitutes, maids, bartenders, and any other persons working in your establishment.
>
> . . . .
>
> Your attention is particularly directed to the depositing requirements and the fact that severe civil or criminal penalties may be imposed for failing to comply timely with the regulations, both as to depositing withheld taxes and filing returns.

Mr. Clyde Maxwell, an experienced attorney specializing in tax matters, had represented the Confortes previously. After the determination letter had been mailed to the brothel owners, the Confortes and twenty-four or so operators of

similar establishments retained Maxwell to represent them in connection with the determination letter. The Confortes executed powers of attorney in Maxwell's favor.

Maxwell met with the Internal Revenue Service in Washington, and after discussions with them wrote a letter to each brothel owner, including the Confortes. The letter, dated January 30, 1973 stated, in part:

> In the meantime, I have assurance that no action will be taken against my clients until this matter has been completely resolved.

This letter, Exhibit 61 at trial, was proffered by the Confortes and their counsel to establish that the Confortes' continued failure to file employment tax returns was not willful.

Maxwell's discussions with the Internal Revenue Service continued until 1976. All of the discussions concerned the issue of whether or not brothel operators should withhold earnings for the prostitutes. There was no discussion as to the auxiliary personnel. (Maxwell said it was "mentioned in passing" but three revenue agents testified the question did not come up at all). Maxwell explains this by stating that the issue of the prostitutes constituted a significantly greater liability for tax assessments than in the case of the auxiliary personnel, so that it occupied the center of his attention. At Maxwell's request, the Internal Revenue Service issued a technical ruling on the prostitute issue in January of 1974. It was adverse. In 1975 Maxwell and the Internal Revenue Service arranged for two test cases on the issue of withholding income for prostitutes. Employment taxes would be paid for two such persons, to be followed by a refund claim which the IRS would deny promptly so district court refund actions could proceed. The Confortes were indicted in August 1977. Maxwell testified that the first he knew of any criminal investigation was a day before the indictment was issued. Aside from the overwhelming evi-

dence of willfulness disclosed above, we think there is ample support in the record for the district court to reject the appellant's professed claim of good faith reliance on counsel or on Internal Revenue Service assurances.

While it is clear to us now what compensation procedures and employment arrangements prevailed at the Mustang Ranch in 1974 and 1975, these details were not known with such specificity to the Internal Revenue Service. Agent Zuver of the Nevada district testified that the nature and extent of the failure to withhold for auxiliary employees came to his attention in early 1975 when the omission of any Mustang Ranch personnel was noted in a routine audit of the form 941 filed by Sally Conforte for the restaurant operation.

Essential to the claim of reliance on counsel is a showing that the reliance be in good faith and that the advice be obtained after full disclosure of all of the facts to which the advice pertains. *See United States v. Mitchell*, 495 F.2d 285, 287 (4th Cir. 1974); *United States v. Stone*, 431 F.2d 1286, 1289 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971); *Bursten v. United States*, 395 F.2d 976, 982 (5th Cir. 1968); *Bisno v. United States*, 299 F.2d 711, 719-20 (9th Cir. 1961). The defendant must also show that he actually relied on the advice, believing it to be correct. *Id.* None of these requisites was met in the instant case. From Maxwell's testimony it appears that the first time he discussed the auxiliary employees in detail with the Confortes was after the quarters during which the violations in question occurred. Maxwell did not testify that he had any conversations with the Confortes before that time regarding the necessity of paying employment taxes for the support personnel. Indeed, the record permits the rather clear inference that Mr. Maxwell did not want to know too much about how the auxiliary employees were paid. There is simply no

evidence that Maxwell knew of the subterfuge adopted at the Mustang Ranch, and, moreover, there is no evidence that the IRS knew of it either.

The one sentence statement in Exhibit 61 cannot be construed as advice from the IRS or from Maxwell that the Confortes were free to adopt the course of conduct they did in the relevant financial quarter of 1974 and 1975. All of Maxwell's written communications to his clients concerned the prostitute issue. And in August, 1973, he wrote all of them, including the Confortes, asking them to "[a]dvise if you or anyone you know is being audited." Even if some assurances had been given to Maxwell with respect to a stay of proceedings against the Confortes on the issue of withholding for auxiliary employees (and we emphasize the record does not permit this inference) the IRS would not be bound by it if the assurance was obtained after facts showing a clear scheme to defraud were deliberately withheld from revenue officials. Moreover, the record is barren of any evidence which would indicate that the Confortes in any way relied on the IRS determination letter or on Maxwell's communications in structuring their method of compensating the auxiliary personnel.

The defense of reliance on advice of counsel, and the related claim made here of reliance on statements, purportedly made to counsel by the Government, fail not only because there was an insufficient disclosure of the factual predicate for such advice, but also because there is no testimony that such advice was ever given. There was no testimony that Maxwell had advised the Confortes that they had a right not to pay employment taxes for the auxiliary personnel. Such advice would have been most unlikely because, on these facts, it would have been professionally irresponsible to give it. Our conclsuion that Maxwell never gave such advice is buttressed by the fact that some twenty-

three of the other brothel operators that he was representing did, during the periods in question, withhold income and file employment tax returns for auxiliary personnel.

In short, none of the necessary premises for a reliance on counsel defense were established. When essential background facts are not furnished by the client to the attorney, when there is no testimony that advice from counsel as to a specific course of conduct was solicited, and when it is highly unlikely that, if solicited, advice constituting a defense to a willful violation would have been given in any event, then no foundation exists at all for the claim of good faith reliance on counsel, and the trier of fact is well within its province to reject it.

We should make one additional point regarding the sufficiency of the evidence to sustain the conviction of Sally Conforte. Counsel argue that it was not shown that she engaged in any willful evasion of the tax laws. We think there is adequate evidence to support the conviction as to Mrs. Conforte. She was the one who filed the returns for the restaurant operation; she took an active role in supervising employees at the Mustang Ranch; correspondence from Maxwell was directed specifically to her. From this evidence it was proper for the trial judge to infer that she was guilty on all four counts.

II.

Alleged Bias and Prejudice.

Appellants contend that even if the evidence was sufficient to sustain the convictions for tax evasion, the case should be remanded for a new trial because newly discovered evidence indicates that Judge Bruce R. Thompson had been biased and prejudiced against them at trial. The motion for a new trial on this ground was heard by Judge Warren J. Ferguson, who denied it after making careful findings

and writing an extensive and thoughtful opinion. 457 F.Supp. 641 (D. Nev. 1978). We affirm Judge Ferguson's ruling.

The facts were set out extensively below, and we need restate them only briefly here. In 1972 Joseph Conforte submitted an application to the American Contract Bridge League's Reno Unit, of which Judge Thompson was President. The unit decided to reject Conforte's application because of his prior felony convictions and his proprietorship of a house of prostitution. Acting at the request of the Reno unit, Judge Thompson wrote, on court stationery, to the National Headquarters of the Bridge League to inquire whether the unit was permitted to reject Conforte's application. The National Headquarters responded that rejection was proper and Judge Thompson wrote a letter of rejection to Conforte on court stationery.

In 1973 Judge Thompson attended a cocktail party after a University of Nevada football game. The topic of raising funds for the team was discussed, and Joseph Conforte was mentioned as a possible contributor. Judge Thompson advised against accepting a contribution from him because Conforte ran a house of prostitution. He also stated that the only problem with one member of the athletic staff was that he was a good friend of Conforte. The judge also said Conforte was "not good for Reno."

A threshold issue we address is the timeliness of appellants' motion for new trial, to the extent it rests on the bridge club incident. When newly discovered evidence is the basis for a new trial motion, it is necessary to show that the evidence could not have been discovered with due diligence at a time early enough to form the basis for a timely motion at or before trial. *United States v. Cervantes*, 542 F.2d 773, 779 (9th Cir. 1976); *see United States v. Beasley*, 582 F.2d 337 (5th Cir. 1978); *United States v. Brashier*, 548 F.2d

1315, 1327 (9th Cir.), *cert. denied*, 429 U.S. 1111 (1977). A showing of due diligence was not made here. Mr. Conforte testified that he destroyed Judge Thompson's letter of rejection upon receiving it and told no one about it. The rejection letter put Conforte on notice that Judge Thompson had had at least some involvement with the decision to reject his application to the American Contract Bridge League, although concededly Conforte did not know the tenor of the correspondence. Conforte neither informed his attorneys of the letter nor conducted even a minimal investigation of the incident prior to trial. In view of this, the district court acted well within its discretion in concluding that appellants failed to meet their burden of establishing that they could not have discovered with diligence the evidence in time to make an appropriate motion at or before trial. *United States v. Schwartzbaum*, 527 F.2d 249, 254 (2d Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). Because the motion on this ground is not timely, we do not consider it, although by so doing we do not intimate that the conduct in question would have been grounds for finding bias or prejudice in any event.

In view of recent discussions in this circuit and in others of the requirement of timeliness for disqualification motions under 28 U.S.C. §455, and in order to address further arguments made by the appellants, we are required to examine whether the rules of disqualification of judges are such that the argument Mr. Conforte makes can be raised for the first time on appeal notwithstanding the above rules pertaining to newly discovered evidence generally. This was a question left open in *United States v. Sibla*, No. 78-1724. (9th Cir. March 3, 1980, as amended April 28, 1980). In that case the disqualification objection had been raised under 28 U.S.C. §144, and we held the objection was specific enough to bring it to the attention of the trial judge in a timely manner under 28 U.S.C. §455.

There were no factors here to excuse failure to raise the claim in the trial court, or to permit raising the issue on appeal. The defendant had received a letter which was notice to him of the grounds now urged for disqualification, and he failed to remind the judge of the matter even when the question of the judge's qualification to sit was expressly discussed before trial. In these circumstances the grounds for recusal of the trial judge under section 455 may not be raised for the first time on appeal. The Second Circuit has held that the requirements of timeliness under section 144 are applicable as well to a section 455 motion. *In re International Business Machines Corp.*, No. 79-3070, slip op. at 1428-29 (2d Cir. Feb. 25, 1980). The Seventh Circuit has adopted language which, broadly interpreted, may indicate that timeliness is not a requirement for raising an objection under section 455. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977). If so construed, the statement in *SCA Services* would be a dictum, since there an objection to qualification was made in the district court before trial on the merits. We conclude timeliness cannot be disregarded in all cases involving the delicate matter of disqualification under section 455, although, as we did in *Sibla*, we leave open here the question whether timeliness may be disregarded in exceptional circumstances.

We do find it necessary to address the question of the remarks made concerning Mr. Conforte at the university function. Appellants contend they should be granted a new trial because these remarks indicate grounds for disqualification under 28 U.S.C. §455(a) & (b). The statute, as amended in 1974, provides:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . .
>
> (e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

The statute imposes a self-enforcing duty on the judge, but its provisions may be asserted also by a party to the action. *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

Recusal whenever a judge has a "personal bias or prejudice concerning a party" is required also by 28 U.S.C. §144. We examined the relation between the two statutes in *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978), and held that the decisions interpreting section 144 are also controlling in the interpretation of the bias and prejudice language in section 455(b)(1). *Id.* at 882; *see In re International Business Machines Corp.*, No. 79-3070 (2d Cir. Feb. 25, 1980); *United States v. Haldeman*, 559 F.2d 31, 132 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Hall*, 424 F.Supp. 508, 533 (N.D. Okl. 1975), *aff'd*, 536 F.2d 313 (10th Cir. 1976); 13 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure §3542, at 345-46 (1975). A second point we made in *Olander* concerned the distinction between two subsections of section 455. We stated: "It would be incorrect as a matter of statutory construction to interpret section 455(a) as setting up a different test for disqualification for bias or prejudice from that in section 455(b)(1)." 584 F.2d at 882.

We interpret this to mean that the standard for determining the appearance or fact of the particular grounds for disqualification is the same, but not that the reach of the two sections is in all cases coextensive. The standard for measuring the grounds of disqualification is similar, but the sections reach different factual contexts. *Olander* does not undercut the recognition that there may be cases within subsection (a) that are not within subsection (b); and we think this must be so or subsection (e), which allows waiver of disqualification under the former subsection but not the latter, would be without meaning. We need not examine for purposes of this case the comparative reach of the two sections, other than to suggest that subsection (a) is designed to cover contingencies not foreseen by the draftsmen, who set out specific grounds for disqualification under subsection (b). This interpretation is consistent with the legislative history, which describes subsection (a) as a "general, or catch-all, provision." H. Rep. No. 93-1453, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6354. Subsection (a) was described as establishing an objective standard which required disqualification "if there is a reasonable factual basis for doubting the judge's impartiality." *Id.* at 6355. Subsection (b), on the other hand, was addressed to specific instances "which are in addition to the general standards set up in section (a)." *Id.* When these specific instances are present, the inquiry must proceed under subsection (b), rather than subsection (a), and waivers may not be accepted.

There may also be room in subsection (a) for somewhat greater operation of the principle that a ground of disqualification may be the appearance of partiality. We recognize, as indeed is apparent from subsection (b), that many cases exist where the mere appearance of partiality suffices for nonwaivable disqualification. It is a general rule that the

appearance of partiality is as dangerous as the fact of it. *Potashnick v. Port City Construction Co.*, No. 76-2373, 78-2386 (5th Cir. Jan. 15, 1980); *United States v. McDonald*, 576 F.2d 1350 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 745 (1973). Certain instances may arise under subsection (a), however, wherein a seeming ground of disqualification can be adequately explained and then waived.

Returning to the instant case, the specific ground alleged for disqualification is bias or prejudice, and we think the test under either subsection (a) or (b) is the same, namely, whether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice. We find no reasonable grounds for questioning the judge's impartiality because of bias or prejudice. While bias or prejudice may spring from many sources, often extrajudicial in their origin, the negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep rooted than an attitude of disapproval toward certain persons because of their known conduct, *see Mims v. Shapp*, 541 F.2d 415 (3rd Cir. 1976), unless the attitude is somehow related also to a suspect or invidious motive such as racial bias or a dangerous link such as a financial interest, and only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify. Judged by these standards, nothing in Judge Thompson's remarks indicates a disqualification to hear the case.

It is not surprising that Judge Thompson would know of Conforte's activities and that he would have a less than high opinion of them. The record discloses that Joseph Conforte does not keep a low profile in Reno and its surrounding areas. He not only owns and operates a house of prostitution in Storey County, but also invites publicity for his activities. Judge Thompson also knew, from his official capacity, that Conforte was a twice-convicted felon. The fact that Judge Thompson advised against soliciting contributions from Conforte, given all of the circumstances of this case, does not provide a basis for questioning his impartiality in trying the case. It is reasonable to expect a judge to advise against involving educational institutions with brothel owners or felons, and we would not think that because of this advice the judge was unable to give the defendant a fair trial.

Appellants contend that their waiver of a jury trial was invalid because Judge Thompson did not disclose his part in the bridge club and cocktail party incidents. We disagree. Appellants and their attorneys discussed the possible waiver of a jury trial for days preceding the waiver. Joseph Conforte took an active role in these discussions. Judge Thompson explained to appellants the differences between a bench and jury trial before accepting the waiver. The specific requirements of Fed. R. Crim. P. 23(a) were complied with. Appellants were sufficiently informed of the basis for Judge Thompson's negative views about Joseph Conforte when the judge informed them of his knowledge of Joseph Conforte's criminal record and that a prospective juror could be disqualified for such knowledge. Appellants' waiver of a jury trial was knowing and intelligent and was therefore valid. *Schneckloth v. Bustamonte*, 412 U.S. 218, 237-38 (1973); *Patton v. United States*, 281 U.S. 276, 312 (1930).

Finally, appellants contend that Judge Thompson's statements regarding their *Sullivan-Garner* income tax returns[1] and the severity of the sentences imposed require recusal. These arguments are without merit. A judge's views on legal issues may not serve as the basis for motions to disquality. *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979); *United States v. Haldeman, supra*, 559 F.2d at 136. Although we conclude in section III that part of the sentences must be vacated, the record makes clear that the sentences were imposed to test appellants' right to file *Sullivan-Garner* returns and not because of any personal bias against them.

III.

Sentencing.

While we affirm the judgments of conviction, we do find certain errors in the sentencing process, and we vacate portions of the sentences imposed upon the appellants. We discuss first the sentence imposed on Joseph Conforte.

On count VII of the indictment the trial court sentenced Joseph Conforte to a term of imprisonment for five years, and in addition a $10,000 fine. This is the maximum penalty for violation of the statute, 26 U.S.C. §7201. The trial court expressly stated that in imposing the maximum sentence on Mr. Conforte it was taking into account his two previous felony convictions. This sentence was within the discretion of the court, and it was insulated from the sentences imposed on the three remaining counts, and the reasons for those sentences. We therefore affirm the sentence on count VII.

We cannot sustain the sentence imposed on Mr. Conforte for the three remaining counts. The district court noted in

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[1]*See* United States v. Sullivan, 274 U.S. 59 (1927); United States v. Garner, 424 U.S. 648 (1976).

the sentencing proceedings its concern with the income tax returns that had previously been filed by the Confortes. The Confortes had filed *Sullivan-Garner* income tax returns in which they claimed a fifth amendment privilege against disclosing the sources of their income. Judge Thompson asked Mr. Conforte's trial counsel whether or not tax counsel agreed with the position that Confortes had a constitutional right to file returns "in which they just arbitrarily set forth a figure which they concede they owe the Government, without any supporting data to show how the computation was made." Counsel responded that this was the position of the Confortes and their tax counsel. The court responded that it thought "that position is 100% wrong. . . . The only possible incrimination they could incur, as I see it, or the basic possible incrimination would be incrimination for filing false and fraudulent tax returns . . ." The court then stated that it proposed to test Joseph Conforte's right to claim a fifth amendment privilege for tax related offenses. The court sentenced Mr. Conforte to consecutive five-year terms on each of the three remaining terms, plus a $10,000 fine on each count. The court declared that its "sole and only reason" for adding the fifteen years to Conforte's sentence on count VII was because of its view that "this defendant has no constitutional right to file the types of income tax returns which he files."

There are two fundamental problems with these additional sentences. First, we have serious doubts that the trial court acted properly in invoking the sentencing process for the principal purpose of securing a ruling from the Court of Appeals on an unsettled question of law. However interesting the question may be, it is entirely unrelated to the defendant's prognosis for reform, and, given the intent of the court in imposing the sentence, it appears only tangentially related to the bearing of defendant's character and past

conduct, factors which might otherwise be legitimate considerations in the sentencing process.[2]

The sentencing process is too intertwined with the fundamental rights of the defendant and turns too closely upon a complicated interplay of the judge's own perceptions of the case and the defendant's fears, anxieties, and future intentions, that it should be used as a vehicle to secure an opinion from an appellate court. It is true that we must and do encourage judges to be candid and explicit in stating their reasons for imposing a sentence. We need not, however, set forth here with precision the line of demarcation between impermissible and permissible sentencing premises, for in this case there was a further error which is itself grounds for vacating the additional sentence. The error was that the trial judge based the sentence upon a legal and factual conclusion for which there was no support.

The trial judge imposed the sentence based on an assumption that defendants filed *Sullivan-Garner* returns solely to avoid possible incrimination under the tax laws. That assumption has no support. It is just as reasonable to assume, and indeed we think it may well have been the case, that the defendants filed *Sullivan-Garner* tax returns to avoid possible incrimination under laws unrelated to revenue collection. These laws would include statutes such as the Mann Act, 18 U.S.C. §2421, or the Racketeer Influence and Corrupt Organizations Revision of the Organized Crime Control Act of 1970, 18 U.S.C. §1962(a)-(d). The court held no hearing to inquire into the basis for the defendants' invocation of the privilege. The possibilities we suggest are probable grounds for assertion of the right, and we cannot

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[2]In our recent opinion in United States v. Carlson, No. 79-1277 (9th Cir. Feb. 28, 1980), we addressed the question of whether a person may claim a fifth amendment privilege on his tax returns to avoid incriminating himself for tax-related matters.

characterize the privilege as resting upon the narrow grounds hypothesized by the trial court. Since the conclusion that the appellants had no reason to claim the privilege other than to avoid tax prosecution is without any factual support, it cannot be the basis for imposition of a sentence.

Although our role in reviewing sentences within statutory prescribed bounds is a limited one, *see Dorzynski v. United States*, 418 U.S. 424 (1974); *United States v. Stevenson*, 573 F.2d 1105 (9th Cir. 1978); *United States v. Lustig*, 555 F.2d 737, 751 (9th Cir.) *cert. denied*, 434 U.S. 926 (1977), we have held that a sentence must be vacated on appeal if the district court uses information which is "(1) false or unreliable, and (2) demonstrably made the basis for the sentence." *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc); *see Brown v. United States*, No. 76-3673 (9th Cir. Jan. 3, 1980); *Gelfuso v. Bell*, 570 F.2d 754 (9th Cir. 1978); *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972). Such was the case here. Joseph Conforte's sentences and the fines imposed on the three counts in addition to count VII are therefore vacated and are remanded for further sentencing.

In the case of Sally Conforte, probation was made conditional upon future nonfiling of *Sullivan-Garner* returns. The court imposed this condition solely to test her right to file *Sullivan-Garner* income tax returns. We have held that "when fundamental rights are curbed [in imposing conditions on probation] it must be done sensitively and with a keen appreciation that the infringement must serve the broad purposes of the Probation Act." *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975) (en banc); *see Dacanay v. Mendoza*, 573 F.2d 1075 (9th Cir. 1978). A sentencing judge must formulate conditions of probation to avoid the risk of compelled self-incrimination. *United States*

v. Pierce, 561 F.2d 735, 740 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). As we stated in *Pierce*:

> [W]e must evaluate whether the condition imposed involves a proper accommodation between the need for information and those Fifth Amendment rights which [the probationer] retains . . . That analysis requires consideration of the condition of probation on its face and then as the condition is applied.

Id. at 740. The same reason that requires us to vacate the additional fifteen years added to Joseph Conforte's sentence requires us to vacate the special conditions on Sally Conforte's probation. The district court could not properly assume that the condition on its face did not require self-incrimination for nontax offenses. *See id.* at 741. We also vacate the consecutive $10,000 fines imposed on counts VIII through X.

IV.

Conclusion

The convictions are affirmed. The denial of the motion for new trial is affirmed. The sentence and fine of Joseph Conforte on count VII is affirmed and the sentences and fines on the remaining counts vacated and remanded for further proceedings consistent with this opinion. The special conditions on Sally Conforte's probation and the fines for counts VIII through X are vacated.

2. Opinion of Ferguson, D.J., on Motion Seeking New Trial on Grounds of Bias and Prejudice on the Part of the Trial Judge, Thompson, D.J.

MEMORANDUM OPINION.

United States District Court, District of Nevada.

United States of America, Plaintiff, v. Joseph Conforte and Sally Conforte, Defendants. No. CR 77-00024 BRT.

Following a bench trial before Judge Bruce R. Thompson, the defendants were convicted and sentenced on four out of ten counts of an indictment charging them with violations of the federal tax laws. After filing notices of appeal, the defendants presented motions for a new trial on the ground that newly discovered evidence indicated that Judge Thompson had been personally biased and prejudiced against them at the time of their trial. The Court of Appeals for the Ninth Circuit remanded the case to permit consideration of the motions and assigned the undersigned to the District of Nevada for that purpose. An evidentiary hearing was conducted in order to resolve the factual issues presented. Having carefully considered the evidence produced at the hearing, as well as the briefs and oral argument of counsel, I conclude that the motions for new trial must be denied as to both defendants.[1]

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[1]The defendants, Joseph and Sally Conforte, are husband and wife. Although Mrs. Conforte joined in her husband's motion for a new trial, the discussion which follows pertains primarily to Mr. Conforte. There is no evidence whatsoever that Judge Thompson had any preconceived personal opinion about or bias against Mrs. Conforte.

I.

A. Factual Background.

Joseph Conforte is the owner of a house of prostitution known as the Mustang Ranch in Storey County, near Reno, Nevada. The present case does not represent his first experience with the criminal justice system:

1. In 1960, he was convicted of extortion by a Nevada state court and was sentenced to state prison.

2. Shortly after that conviction, he pled guilty to a federal income tax violation charge in the District of Nevada and was sentenced by Judge William Mathes to federal prison. While serving his sentence, Conforte made a motion to withdraw his plea of guilty to the federal charge. That motion was heard by Judge Thompson and was denied. The defendant was subsequently released from McNeil Island federal prison in 1965.

3. In 1968, Conforte was indicted and tried before Judge Thompson for a violation of the Mann Act, 18 U.S.C. §2421. At the conclusion of the government's case, Judge Thompson granted a motion for judgment of acquittal.

4. In 1970, the Internal Revenue Service filed a civil complaint for condemnation and forfeiture of certain trailer houses used by Conforte in his prostitution business. Again, the matter was heard by Judge Thompson, who decided the case in Conforte's favor.

Apart from his appearances in court, the defendant has had only very limited personal contact with Judge Thompson. Both Conforte and Judge Thompson are avid bridge players, and on approximately 25 occasions they have played in the same tournaments, although never as partners. On each such occasion they said "hello" to each other, and at one tournament they spoke briefly about politics.

Conforte and Judge Thompson also recall having met outside the courtroom at three other times. The first was shortly after Judge Thompson had acquitted the defendant of the Mann Act charge. They both attended a play at the Reno Little Theatre, where Mr. Conforte introduced his daughter to the judge during an intermission. The second time was at a charitable event for which Mr. Conforte had donated two or three mink coats to be auctioned. The two talked briefly on that occasion. Their third meeting was in a men's clothing store, and again they spoke only briefly. Mr. Conforte describes Judge Thompson as having been "very cordial, very friendly" on each of these occasions.

B. The Present Case.

In the fall of 1977, a ten count indictment was filed against the Confortes charging them with violations of 26 U.S.C. §7201, the willful attempt to evade and defeat withholding taxes due the United States. Prior to trial, the government and the defendants appeared before Judge Thompson for the purpose of entering a waiver of the right to a jury trial. A transcript of those proceedings is set out in the margin.[2] Before the jury waiver was accepted by the Court,

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[2]MR. BROWN: If you Honor please, I represent Mr. Conforte in association with Mr. Hochman of Los Angeles, who has been previously admitted, and he is not here today, but Mr. Harvey Tack from his office is, who has not been admitted, and I will file the necessary papers.

Mrs. Conforte is represented by Mr. Maxwell and also Mr. Claiborne.

We have considered the matter of trial by jury, and we have been considering it for some time, and if your Honor please, we wish to move the Court at this time to consider our request that a jury be waived in this matter, and that all issues of fact be tried by the Court.

MR. PIKE: The Government has no objections to such a waiver, your Honor, and will join in it.

THE COURT: Mr. and Mrs. Conforte, you have been advised, I am sure, that you have a right to a jury trial. A jury would be composed of twelve citizens drawn at random from the registered voter list of this community. The jury would have to be persuaded beyond a reasonable doubt of your guilt of one or more of the charges contained in the indictment before they could find you guilty.

Judge Thompson advised the defendants that he had knowledge of facts about Mr. Conforte, based upon the defendant's prior court cases, which would constitute grounds for disqualification if he were a juror. The defendants then specifically waived any objection to Judge Thompson's qualification to sit as the trier of fact despite his prior knowledge regarding Mr. Conforte.

The case proceeded to trial before Judge Thompson. Following the presentation of evidence by the prosecution and

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Their decision would have to be unanimous, and they would all have to agree.

If you waive a jury trial, the question of your guilt or innocence would be left solely to me as the judge presiding over the trial. Of course, my decision would also have to be unanimous, because there is only one of me.

I would also have to be persuaded by the evidence beyond a reasonable doubt of your guilt before I could find you guilty.

Do you understand what I have said?

MR. CONFORTE: Yes.

MRS. CONFORTE: Yes.

THE COURT: Do you desire to waive a jury trial, Mr. Conforte?

MR. CONFORTE: Yes, sir.

THE COURT: Do you, Mrs. Conforte?

MRS. CONFORTE: Yes, sir.

THE COURT: *There is something else involved in this waiver of jury trial that should be brought out in the open. I am aware of Mr. Conforte's criminal record. Some years ago I passed upon a post-conviction remedy motion that was filed on behalf of Mr. Conforte. I am aware of two trials in this court which involved Mr. Conforte, one in which I believe he was charged with a violation of the White Slave Traffic Act, and another which involved an effort to abate the operation of the so-called Mustang Ranch for Internal Revenue violations.*

Facts of that nature, if known to a juror prior to impanelment of the jury, would be a basis for disqualification of a juror. If I am going to be the trier of the facts in this case, I can't eliminate the knowledge I already have. So I want you to know—and you know what I know—that if I am going to preside over this trial without a jury, you will have to waive any basis of disqualification because of my prior knowledge of facts concerning Mr. Conforte primarily; I don't know much about Mrs. Conforte.

Do you understand what I have told you? (emphasis added)

MR. CONFORTE: Yes, sir.

MRS. CONFORTE: Yes, sir.

THE COURT: Do you agree that I am not disqualified to try the case?

(footnote continued on following page)

the defense, the Confortes were acquitted by the judge on the first six counts of the indictment pertaining to the filing of false quarterly returns. However, they were found guilty on the remaining four counts of evasion of withholding taxes. Mr. Conforte was sentensed to 5 years in prison on each count, the terms to run consecutively for a total of 20 years. In addition, he was fined $10,000 on each count for a total of $40,000. Mrs. Conforte was sentenced to concurrent prison terms of 4 years on each of the four counts; however, execution of the sentence was suspended, and she was placed on probation. She was also fined $10,000 on each count.

At the time of sentencing Judge Thompson commented extensively regarding his reasons for imposing sentences which he recognized to be particularly severe. The relevant portions of his remarks are printed in full in the margin.[3]

MR. CONFORTE: I agree, sir.
THE COURT: Do you, Mrs. Conforte?
MRS. CONFORTE: Yes.
THE COURT: Mr. Maxwell, is this proposed waiver of a jury trial with your approval and after full conferences and explanations with your client?
MR. MAXWELL: It is, your Honor.
THE COURT: Is that true of you, also, Mr. Brown?
MR. BROWN: Yes. We have discussed it for days, your Honor.
THE COURT: The waiver will have to be signed in open court. Do you have one available?
Is there any other information I should discuss with the defendants, Mr. Pike, according to your—
MR. PIKE: Not that I am aware of, your Honor.
(Pause.)
THE COURT: Each defendant has signed a waiver of jury trial and a waiver of special findings of fact, which has been approved by each defendant's attorney and by the United States Attorney. It will be approved by the Court.

[3]THE COURT: I want to ask Mr. Hochman a question, as he is a tax specialist and is present here today.
Although Mr. Maxwell is the person who advised the defendants with respect to the form of their income tax returns, which have been

The judge explained that he was especially concerned about the fact that, in at least one of the tax years in question, the defendants had filed "Sullivan" tax returns. In such returns, named after the decision in *United States v. Sullivan*, 274 U.S. 259 (1927), the taxpayer declares only his net income and tax due based upon his own undisclosed computation of net worth. No other information is furnished because the taxpayer claims a Fifth Amendment privilege against any additional disclosure. Judge Thompson felt very strongly that the Confortes were not entitled to file such limited returns, and he candidly informed the defendants and their counsel that the sentences were designed to assure that the "Sullivan" return question would be addressed and decided by the appellate courts.

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referred not only in the trial but by Mr. Conforte in his plea to the Court: Is it your contention, Mr. Hochman, or if you do not wish to answer that question, is it your understanding of Mr. Clyde Maxwell's position and professional advice that a person in the position of these defendants, have a right to, a constitutional right to file the types of returns which they filed in which they just arbitrarily set forth a figure which they concede they owe the Government, without any supporting data to show how the computation was made?

MR. HOCHMAN: He passionately believes that, Your Honor, and predicates it on some Supreme Court cases.

THE COURT: I know the cases he referred to, which are referred to in the returns, the addenda to the returns that have been filed. They are cited.

Now, the sentences that I am about to impose are going to be framed that because I think that position is 100 percent wrong. I think you have no constitutional right in operating a legal business to refuse to disclose the details of your operations to the Internal Revenue Service for the purpose of a correct computation of income tax returns. I think that the cases cited upon which counsel relies have been misinterpreted and misapplied. I don't think that Mr. and Mrs. Conforte, simply because they are operating a type of business which deals primarily in cash and which lends itself to concealment of income and expenses, are permitted to evade the Internal Revenue laws of the United States by filing a return in which they in effect say that they cannot or will not disclose their true income and expenses because of a specious claim that it would tend to incriminate them.

The only possible incrimination they could incur, as I see it, or the basic possible incrimination would be incrimination for filing false and

(footnote continued on following page)

C. The "Newly Discovered Evidence."

In their motions for a new trial, the defendants allege that following their convictions they discovered evidence which indicates that Judge Thompson harbored a personal bias against them at the time of their trial and sentencing. The

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fraudulent tax returns if they didn't attempt in any respect to comply with the Internal Revenue laws.

Now, I recognize that these offenses with which these defendants have been convicted are not offenses for willful attempts to defeat and evade income taxes due, but I think that I do have the right in imposing sentence to take that information, which is uncontradicted, not only in the record during the trial but in the record before me in connection with the pre-sentence report, in formulating a just and proper sentence in this case. It is my intention to do it so that we can find out, I hope definitively, whether taxpayers in the position of these two defendants have a right to conceal their true taxable income from the Internal Revenue Service. I am going to do it by imposing certain conditions on one sentence and formulating the other sentence in a way so it will be 100 percent clear that if you do have a constitutional right to do that a portion of my sentence is going to be illegal.

I do want to say one other thing, which counsel will be in a position to explain to their clients. I may appear to counsel and to the defendants that the sentences I am about to impose are unduly harsh and severe, but I do it with full knowledge that under the Rules of Criminal Procedure that at an appropriate time I will have the power and authority to modify or reduce those sentences. But I do think it is important that we find out in the administration of the tax laws of this country whether this type of position can properly be taken by taxpayers in the United States.

Sally Conforte, will you please rise.

It is the judgment and sentence of the Court that with respect to each of the four counts of the indictment of which you stand convicted, that you be fined in the sum of $10,000, a total fine of $40,000.

It is the further judgment and sentence of the Court that you be committed to the custody of the Attorney General or his authorized representative for a term of four years on each count of the indictment. Execution of prison sentence is suspended, and the defendant is placed on probation for a term of five years, subject to the usual conditions of probation, and subject to the special condition that in connection with any business owned or operated by this defendant she maintain full and complete books and records of the receipts and expenditures of the business in order to permit an accurate determination of the adjusted gross income of that business under the Internal Revenue Code, and that she each year cause to be filed a full and complete and accurate income tax return under the Internal Revenue Code for each business

evidence relates to two incidents: (1) comments made by Judge Thompson in a 1973 letter on behalf of the Reno Unit of the American Contract Bridge League; and (2) remarks allegedly made by Judge Thompson at a cocktail party following a football game in 1973. As developed at the evidentiary hearing, the facts regarding these two incidents may be summarized as follows:

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in which she has any interest or any responsibility with respect to the tax obligation under the Internal Revenue Code. . . .

Mr. Conforte, under each of the four counts of the indictment of which you have been convicted, the Court fines you in the sum of $10,000, a total fine of $40,000.

The Court sentences you to the custody of the Attorney General for a period of five years on Count VII of the indictment.

In sentencing Mrs. Conforte I took into consideration the fact that she has no prior criminal record of any sort, and has demonstrated to the satisfaction of the Court that she suffers from several different ailments which would make it hazardous to her health to be incarcerated.

With respect to Mr. Conforte, he has two prior felony convictions, one of which involved income tax evasion. Because of that I don't think he is a proper subject for probation. However, because of the kind of offenses of which he has been convicted at this time, it seems to me that in the absence of some other consideration, in view of his past criminal record and in view of the recommendations that have been received, normally a five-year sentence would be adequate. . . .

On Counts VIII, IX and X, it is the judgment and sentence of the Court that in addition to the fine the defendant be committed to the custody of the Attorney General or his authorized representative for a term of five years on each count.

It is the order of the Court that the sentences under Counts VIII, IX and X will run consecutively to the sentence under Count VII; and the sole and only reason for making those three additional five-year terms consecutive is because of my opinion that this defendant has no constitutional right to file the types of income tax returns which he files; that he is in a legitimate business and he has the same obligation as any other businessman to keep accurate books and records and to make full disclosure to the Internal Revenue Service of his receipts and disbursements so that an accurate determination of his adjusted gross income and his tax liability can be made.

If those kind of income tax returns, paying out an arbitrary amount that he voluntarily pays the Government, refusing to disclose the details of receipts and disbursements as required by the law, and relying upon a nonexistent constitutional right to refuse to file such returns had not been filed by this defendant, the sentences under Counts VIII, IX and X would have, by this Court, have been made to run concurrently with the sentence under Count VII.

The defendants are remanded for execution of sentence.

1. The Bridge Club Letter.

In late 1972, Mr. Conforte submitted a membership application to the Reno Unit of the American Contract Bridge League. At the time that Mr. Conforte applied for membership, Judge Thompson was the president of the Reno Unit. When Mr. Conforte's application was received by the Board of Directors there was extensive discussion as to whether or not it should be accepted. Although prostitution was not illegal in Storey County, Nevada, the women on the Board objected to Mr. Conforte being a member of their organization because of his occupation. During the discussion, Judge Thompson also informed the Board members of Mr. Conforte's felony record.

The consensus of the Board was that, if possible, Mr. Conforte's application to the Reno Unit should be rejected. As president, Judge Thompson was asked to write to the national organization for guidance on the procedure and the propriety of declining to accept Mr. Conforte as a member. The Board also felt that Judge Thompson was an appropriate person to write the inquiry because it was anticipated that rejection of the application might raise legal questions and that he would be able to understand any such discussion.

On February 2, 1973, Judge Thompsom wrote on court stationery to the national headquarters of the League and presented the questions which had been raised by the Board regarding Mr. Conforte's application.[4] The letter was straightforward in expressing the Board's opinion that Mr. Conforte was not of "good moral character" and that he was not the sort of person with whom the members of the unit desired to associate.

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[4]The full text of the letter was as follows:

In response to his letter, Judge Thompson was advised by the general counsel to the American Contract Bridge League that rejection of Mr. Conforte's application on the grounds stated by the Board appeared to be appropriate. A

Chambers of
Bruce R. Thompson
United States District Judge

February 2, 1973

American Contract Bridge League
2200 Democrat Road
Memphis, Tennessee 38131;

Gentlemen:

At the Reno Regional, the end of December, one of the ACBL Directors accepted and turned over to the membership chairman of the Reno Unit an application and dues from one Joseph Conforte. The membership chairman, in turn, forwarded the application to national headquarters.

Our by-laws prescribe "good moral character" as a qualification for membership. The matter has been discussed by the Board of Directors of the Reno Unit and we do not wish to have Mr. Conforte as a member. At least, we do not wish to associate with him. Mr. Conforte has twice been convicted of felonies, extortion and income tax evasion and has served terms in state and federal penitentiaries. He is a notorious bawdy house keeper and is presently engaged in that business in nearby counties. There is nothing wrong or objectionable with his conduct at the bridge table. We understand he desires to participate in ACBL activities, particularly at regional and national tournaments, and recently played in the Hawaii Regional.

I suppose there are a good many members floating around in ACBL who would not be acceptable associates for persons with moral scruples, but there is an obvious difference between regular association with an undesirable character in a small local unit and playing bridge against some stranger in a regional or nation national tournament.

Our questions are:

1. May we revoke Conforte's membership?
2. May we accept his membership but bar his participation in Reno Unit activities?
3. Is it possible to be an ACBL member without belonging to a local unit?

Your prompt attention will be appreciated.

Very truly yours,

s/ Bruce R. Thompson
Pres., Reno Unit

P.S. Some of the board members anticipate, or apprehend, as the case may be, that Conforte may invite one of his "ladies" as his partner for a unit game. This possibility was not included in the body of the letter because the reaction of our mixed board was ambivalent.

majority of the Board then voted to deny membership to Mr. Conforte. Again using his court stationery, Judge Thompson wrote to the defendant informing him of the decision of the Reno Unit and forwarding a check for $3 as a refund of the application fee. The rejection by the bridge club had a profound effect upon Mr. Conforte. He was very upset, and his pride was so hurt that he tore up the check and the letter from Judge Thompson and declined to tell any of his acquaintances about the incident.

2. The Football Cocktail Party.

In the fall of 1973, the University of Nevada-Reno defeated the University of Nevada-Las Vegas in football. After the game there was a cocktail party at the home of one of the Reno assistant coaches who was the son of Judge Thompson's secretary. Judge and Mrs. Thompson attended, together with about fifty other guests. Also at the party was Mr. Roy Woofter who at the time was the district attorney for Clark County (Las Vegas), Nevada, and a good friend of Mr. Conforte. Mr. Woofter was with a group of four other persons.

At the party, a conversation took place between Mr. Woofter and Judge Thompson during which Mr. Conforte's name was mentioned. The exact contents and circumstances of the conversation are in dispute, and much of the evidence produced at the hearing on the new trial motions concerned this incident. After evaluating and weighing the credibility of the testimony given by various witnesses, the court concludes that the most believable evidence supports the following findings of fact:

a. The head coach of the Reno football team in 1973 was Mr. Jerry Scattini. At the party, Mr. Woofter and Judge Thompson were engaged in a conversation with several other persons regarding Mr. Scattini's

failure to recuse himself under the provisions of 28 U.S.C. §455. The statute, completely rewritten by Congress in 1974, provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . . .
>
> (e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

The stated purpose of the revision of section 455 was to "broaden and clarify the grounds for judicial disqualification," to "enhance the public confidence in the impartiality of the judicial system," and to eliminate the "so-called 'duty to sit' . . ." 3 U.S. Code Cong. & Ad. News (1974) 6351, 6355. *See generally* 13 Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction §§3541-53 (1975); Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 Fordham L. Rev. 139 (1976). Although the statute imposes a self-enforcing duty on the judge, its provisions may be asserted by a party to the action by means of a motion in the trial court, by mandamus, or on appeal. *Davis v. Board*

coaching ability. It was generally agreed that Mr. Scattini was a good coach, but that the Reno team would be better if it had greater financial support. In connection with the discussion about financial backing for the team, Mr. Conforte was mentioned as a possible source of funds.

b. Judge Thompson was, and is, strongly opposed to amateur athletics at the University of Nevada being associated with and financially supported by one who is engaged, as Mr. Conforte is, in the business of running a house of prostitution.

c. In response to the comment that Mr. Conforte might contribute to the team, Judge Thompson made a statement to the effect that the only problem with coach Scattini was that he was a good friend of Mr. Conforte and that Mr. Conforte was "not good for Reno."[5]

II.

The defendants' primary contention on this motion is that a new trial should be granted because of Judge Thompson's

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[5]Several of the people who attended the party with Mr. Woofter and who overheard parts of the conversation with Judge Thompson testified that the judge made a stronger statement, saying that Mr. Conforte should be "run out of town." Judge Thompson does not recall the conversation about Mr. Conforte, but states that it is very unlikely that he would have made any such remark. Mr. Woofter, the person who was most directly involved in the conversation and who later contacted the other witnesses about their recollections and their willingness to testify for Mr. Conforte, stated on cross-examination that he did not specifically recall Judge Thompson saying that Conforte should be "run out of town" and that he might have merely inferred that sentiment from the judge's statement that Conforte was "not good for Reno." The testimony of the witnesses who overheard the conversation must be largely discredited because it appears that their recollections as to Judge Thompson's exact words were based more on a power of suggestion four years after the incident than on any direct memory of the event in question. Therefore, I have concluded as a matter of fact that Judge Thompson *did not* say that Mr. Conforte should be "run out of town."

of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *cf.* 28 U.S.C. §144, which establishes a specific procedure by which a litigant may challenge the impartiality of a district court judge prior to or during a trial.

The issue of judicial disqualification raised by the defendants is a difficult and sensitive one that goes to the heart of our system of justice. In 1938, Judge Frank, writing for the Second Circuit Court of Appeals, discussed the problem with great insight:

> Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "impartiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. . . . Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference.
>
> . . . .
>
> . . . Much harm is done by the myth that merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that

> he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases . . . .
>
> . . . .
>
> Disinterestedness does not mean childlike innocence. If the judge did not form judgments of the actors in those courthouse dramas called trials he could never render decisions.

In re J. P. Linahan, 138 F.2d 650, 651-54 (2d Cir. 1938).

With these basic principles in mind, this court must proceed to carefully analyze and consider the defendants' contention that they should receive a new trial because Judge Thompson was impermissibly biased and prejudiced against them. The defendants assert three factual grounds to support their allegations of bias: (1) Judge Thompson's statements at the time of sentencing regarding the "Sullivan" tax returns, (2) the severity of the sentences imposed on Mr. Conforte, and (3) the judge's 1973 comments about Mr. Conforte in the bridge club letter and at the football cocktail party.

A. The "Sullivan" Tax Returns.

The defendants contend that Judge Thompson's statements expressing his strenuous disapproval of Mr. Conforte's use of "Sullivan" returns reflect an undisclosed bias against Mr. Conforte and his tax counsel, Mr. Clyde Maxwell, who appeared as a witness during the trial. They argue that because of his strongly held opinion on the matter of the tax returns, Judge Thompson was required under the provisions of section 455 to disqualify himself from hearing the defendants' case. This argument is not persuasive. It is universally held that adverse judicial rulings on legal or factual matters or the judge's views on particular legal issues do not support an inference of bias against a party sufficient

to require recusal. *United States v. Azhocar*, No. 76-3737 (9th Cir. June 16, 1978) (slip opinion at 1897); *United States v. Haldeman*, 559 F.2d 31, 133 n. 300 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *Botts v. United States*, 413 F.2d 41, 44 (9th Cir. 1969); *cf. Duplan Corp. v. Deering Millikan, Inc.*, 400 F.Supp. 497 (D.S.C. 1975), *aff'd on other grounds*, 522 F.2d 809 (4th Cir. 1975) (even erroneous rulings are not grounds for disqualification due to bias when subject to correction on appeal).

This rule is well founded in reason:

> [I]f the words "impartiality might reasonably be questioned" and "avoid impropriety and the appearance of impropriety" were to be interpreted to encompass judicial rulings in the course of a trial or other proceeding, . . . then there would be almost no limit to disqualification motions and the way would be opened to a return to "judge shopping," a practice which has been for the most part universally condemned. Certainly every ruling on an arguable point during a proceeding may give "the appearance of impartiality," in the broadest sense of those terms, to one party or the other.

Lazofsky v. Sommerset Bus Co., 389 F.Supp. 1041, 1044 (E.D. N.Y. 1975). Therefore, Judge Thompson's opinion about the legality of the defendants' use of the "Sullivan" return cannot be accepted as a ground for disqualification under section 455.

The defendants present no convincing evidence of any personal bias against Mr. Maxwell. Even if Judge Thompson's disapproval of Mr. Maxwell's tax advice could be construed as an indication of some prejudice against Mr. Maxwell himself, it is clear that a judge's bias against an attorney is not sufficient to establish the kind of bias against a party which is necessary to warrant disqualification. *Davis v. Board of School Commissioners*, *supra*, 517 F.2d at 1049-52; *United States v. Zagari*, 419 F.Supp. 494, 504-05 (N.D. Cal. 1976).

B. Severity of the Sentence.

As a second alleged indication of impermissible prejudice against them, the defendants point to the sentence which Judge Thompson imposed on Mr. Conforte following his conviction. They contend that the imposition of a maximum sentence of four consecutive five-year prison terms for a tax offense is so harsh and severe as to demonstrate the judge's bias. Even discounting the fact that Judge Thompson had himself acquitted the defendants on six of the ten counts with which they were charged, this contention cannot stand. The severity of a sentence, if within the statutory limits, cannot support a claim of personal bias. *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir. 1956); *Calvaresi v. United States*, 216 F.2d 891, 900 (10th Cir. 1954); *United States v. Nehas*, 368 F.Supp. 435, 437 (W.D. Pa. 1973).

Furthermore, in this case there are particular reasons not to regard the sentence as proof of bias. During the sentencing proceedings Judge Thompson made it clear that "the sole and only reason for making those three additional five-year terms consecutive is because of my opinion that this defendant has no constitutional right to file the type of income tax return which he files." The judge patently aimed the sentence more at the Court of Appeals than at Mr. Conforte and clearly stated on the record that if the defendant's so-called "Sullivan" tax returns were found to be constitutionally protected, then the consecutive aspect of the sentence would be invalid. In addition, the judge stated that he might later modify or reduce the sentence. Thus, it is clear that in this case the propriety of the sentence is strictly a matter for appeal and not a question of personal bias.

C. The Bridge Club Letter and Cocktail Party Comments.

The defendants' most strenuous arguments in support of their position that Judge Thompson violated the provisions

of section 455 by failing to disqualify himself are based on the judge's comments about Mr. Conforte in the bridge club letter and at the football cocktail party. The problems presented by these two incidents are more complex than those raised by either the "Sullivan" return statements or the harshness of Mr. Conforte's sentence, and a somewhat more extensive discussion is required.

1. Timeliness of the Motion.

An initial difficulty with the defendants' contention that they should receive a new trial because of Judge Thompson's 1973 prejudicial statements about Mr. Conforte is their failure to raise the question prior to the trial. The requirement that an assertion of judicial bias must be made in a timely manner is found in 28 U.S.C. §144[6], and it has been construed to demand that a party raise the disqualification issue at the earliest moment after discovery of the facts allegedly supporting recusal. *See United States v. Hurd*, 549 F.2d 118, 119 (9th Cir. 1977); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-16 (4th Cir. 1974); *Lucas v. United States*, 325 F.2d 867, 869 (9th Cir. 1963); *Rademacher v. City of Phoe-*

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[6]28 U.S.C. §144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

nix, 442 F.Supp. 27, 29 (D. Ariz. 1977); *cf. Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 437 F.Supp. 230, 234 (D. Hawaii 1977) (new section 455 does not abrogate section 144 timeliness requirement).[7]

With respect to the cocktail party statements, it appears from the evidence that the defendants and their counsel were not aware of the facts prior to the trial of this case. As to the comments made in the bridge club letter, however, there is convincing evidence that Mr. Conforte had sufficient notice of Judge Thompson's attitude about his membership in the club to make his post-trial assertion of that particular ground for disqualification untimely.

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[7]Defendants deny the applicability of the timeliness requirement on the grounds that their motion relies only on section 455, not on section 144, and that section 455 does not include a rule regarding timeliness. *See* SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (Denial of disqualification on procedural grounds of untimeliness, waiver or estoppel is improper where basis for recusal is family relationship under section 455 (b) (5)). It is clear, however, that the personal bias and prejudice provisions of the two sections are in pari materia and that the statutes should consequently be construed together. While section 144 sets forth specific procedural safeguards, section 455 is wholly silent about procedure. Thus, it is sensible to use section 144's procedural framework to fill the gap in section 455. To do otherwise would allow any litigant to evade the procedure established in section 144 by simply ignoring that section in favor of section 455. The result would be to effectively repeal section 144 and render it meaningless.

Furthermore, the application of a timeliness requirement with regard to the assertion of claims of personal bias is supported by substantial considerations of policy. The purpose of such a requirement is to prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to "sample the temper of the court" before deciding whether to raise an issue of disqualification. Peckham v. Ronrico Corp., 288 F.2d 841, 843 (1st Cir. 1961); Rademacher v. City of Phoenix, 442 F.Supp. 27, 29 (D. Ariz. 1977). As stated in a recent case:

> There are strong policy reasons for strictly construing the timeliness requirement. Without such control, a party could speculate on the court's final judgment, withhold information learned before trial, and disqualify the judge if the decision went against him. Further, it is intolerable that a court should so lightly allow the adversary to be put to the expense of a second trial and face all the other problems of long delays in trying a matter.

Rousell v. Tidelands Capital Corp., 438 F.Supp. 684, 691 (N.D. Ala. 1977).

Mr. Conforte knew in 1973 that Judge Thompson was the president of the Reno Unit to which he applied for membership and that the letter of rejection which he received was signed by Judge Thompson. In fact, the defendant testified that he had a very deep emotional reaction to the notice of rejection, in part because of the fact that it was sent to him by the judge. There is no question that, at the time of their extensive pretrial discussions concerning the advisability of waiving a jury, the defendants' counsel were unaware of the bridge club incident. However, Mr. Conforte was aware of it. He may not have known specifically of the letter which Judge Thompson wrote to the bridge league, but he knew three years before the trial, and vividly remembers it today, that Judge Thompson informed him that he was not wanted as a member of the Reno unit.

Having remained silent about the bridge club incident until after his conviction, the defendant cannot reasonably be permitted to claim that his assertion of that basis for Judge Thompson's disqualification is timely. This is particularly true in view of the fact that the issue is raised for the first time in this motion for a new trial on the grounds of newly discovered evidence. In order to sustain such a motion, it must appear that the evidence relied on is in fact newly discovered. *United States v. Brashier*, 548 F.2d 1315 (9th Cir. 1976). Therefore, insofar as the defendants rely on the bridge club letter to support their motion, the untimeliness issue is dispositive. It is still necessary, however, to consider whether Judge Thompson's cocktail party statements are themselves sufficient to establish grounds for disqualification under section 455.[8]

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[8]Since the underlying attitude toward Mr. Conforte evidenced in the bridge club letter and in the cocktail party conversation is essentially the same, the statutory analysis is equally applicable to both of these factual grounds for the defendants' motion. Assuming arguendo that

(footnote continued on following page)

2. Application of Section 455(a).

Section 455(a) requires disqualification when a judge's impartiality "might reasonably be questioned." The standard is objective and requires recusal whenever there is a "reasonable factual basis for doubting the judge's impartiality."[9] As Justice Frankfurter has stated, "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." *Public Utilities Commission v. Pollak*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., recusing himself in a separate opinion). Although the standard of a "reasonable factual basis" is somewhat nebulous, it seems clear that Judge Thompson's expressions of his negative feelings about Mr. Conforte at the football cocktail party do raise reasonable doubts about his impartiality and do create at least an appearance of some bias against the defendant.

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the defendants' contentions regarding the bridge club letter were timely raised, the following discussion is dispositive of defendants' claim that the bridge club incident required Judge Thompson's disqualification.

[9]The legislative history of the revision of section 455 includes some elaboration on the application of this standard:

> Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase "in his opinion." This general standard is designed to promote public confidence in the impartiality of the judicial process by saying in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case.
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> . . . .
>
> At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a ques-

However, section 455(e) permits waiver of the disqualification required by subsection (a), provided that the waiver is "preceded by a full disclosure on the record of the basis for disqualification." It appears without question from the record that such a waiver was made by the defendants in this case. During the hearing on the jury waiver, Judge Thompson took care to explain to the defendants and their counsel that he was well aware of Mr. Conforte's past criminal activity and that his knowledge of the defendant was such that he would not be qualified to sit as a juror on a case against Mr. Conforte. He then asked the defendants if they understood and were willing to waive "any basis of disqualification because of my prior knowledge of the facts concerning Mr. Conforte." The defendants expressly agreed to such a waiver, but they now claim that the waiver was invalid because it was not preceded by "full" disclosure of the basis for disqualification.

In support of their claim that the waiver was invalid, the defendants strenuously argue that, before Judge Thompson could accept an effective waiver of his disqualification under section 455(a), it was necessary for him to disclose to the defendants the specific facts which gave rise to an appearance of bias on his part, *i.e.*, the bridge club letter and the cocktail party comments. Such a standard of disclosure, however, cannot reasonably be imposed. The statute requires that a waiver be preceded by a full statement of the basis for disqualification; it does not impose on a judge the

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> tion against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

3 U.S. Code Cong. & Ad. News (1974) 6354-55. *See* United States v. Ritter, 540 F.2d 459, 462 (10th Cir.), *cert. denied sub nom* Olson Farms, Inc. v. United States, et al., 429 U.S. 951 (1976); Mavis v. Commercial Carriers, Inc., 408 F.Supp. 55, 61 (C.D. Cal. 1975).

impossible task of recalling and reciting every incident or factual detail which might contribute to the overall impression of partiality.[10] It would strain credulity to assume that, in imposing a requirement of "full disclosure," Congress intended that an express and deliberate waiver of disqualification such as that made by the defendants in this case would be invalid and a new trial required merely because the judge did not burden the record with a litany of his every thought or remark concerning the defendant during a period of over four years.

Therefore, while it is true that Judge Thompson's advice to the defendants regarding the problem of his disqualification did not include any reference to the particular incidents which are the subject of this motion, there is no doubt that the defendants were sufficiently apprised of the basis for the judge's negative views about Mr. Conforte—that is, the judge's knowledge of Mr. Conforte's criminal past—so as to make their waiver a knowing and intelligent one. The legislative history of the revision of section 455 suggests that judges have a measure of discretion with respect to recusal under section 455(a): "The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." 3 U.S. Code Cong. & Ad. News (1974) 6351, 6355. *See also United States v. Haldeman*, *supra*, 559 F.2d at 139; *United States v. Patrick*, *supra*, 542 F.2d at 390. Under the circumstances of this case Judge Thompson's acceptance of the defendants' waiver was an exercise of judicial discretion fully permitted by section 455(e).

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[10]Such a requirement would be completely unrealistic. Indeed, in the instant case it would have been impossible for Judge Thompson to disclose to the defendants the facts regarding his cocktail party statements because he did not, and does not now, have any memory of that conversation about Mr. Conforte.

As a second ground of attack on the validity of their waiver of Judge Thompson's disqualification, the defendants rely on the provisions of canon 3C of the American Bar Association's Code of Judicial Conduct as adopted and amended by the United States Judicial Conference. This canon is almost identical to section 455 except that, since 1975, the canon has eliminated the provision for waiving disqualification, so that even if the judge's impartiality is merely questionable, as contemplated by section 455(a), he is to step down in all cases. *See* Code of Judicial Conduct, Canon 3C(1), 69 F.R.D. 273, 277 (1975). In addition, the canons state that they prevail over any less restrictive statutes. *Id.* at 273. The defendants argue that, in view of this provision, Judge Thompson erred in accepting their waiver of his disqualification and a new trial is required.

The only decisions cited by the defendants in support of their assertion are cases in which judges relied on the canons as a basis on which to disqualify themselves before a trial had begun. *Smith v. Sikorski Aircraft*, 420 F.Supp. 661 (C.D. Cal. 1976); *Spires v. Hearst Corp.*, 420 F.Supp. 304 (C.D. Cal. 1976). There do not appear to be any cases reversing a lower court's failure to recuse based on the canons. This is understandable because, as a practical matter, the disqualification provisions of the Code of Conduct can only be construed as establishing a standard for judicial behavior rather than as imposing a mandatory duty enforceable after the fact by the reversal of otherwise proper judicial decisions. The reason for this construction of the canons is enunciated in *Duplan Corp. v. Deering Milliken, Inc.*, *supra*, 400 F.Supp. at 504-05:

> A federal judge who has become active in a proceeding has the benefit of statutory guidance as to when and under what conditions he should disqualify himself. A judge in his official capacity is not responsible to the Judicial Conference but to the people; the people

> exercise control over judges through the Congress of the United States. If the statutory guidelines on recusal which were promulgated by Congress do not require the disqualification of a presiding judge, and indeed may impose upon him a duty *not* to recuse himself, it is inconceivable that the Judicial Conference intends to order him to disobey the Congressionally-imposed duty.
>
> This court is therefore of the opinion that, once a federal judge has commenced his deliberations in a particular action, any challenge to his continued consideration of that matter, based on grounds for which Congress has provided a remedy, must employ those remedies and not the Code of Judicial Conduct. (emphasis in original)

The waiver of Judge Thompson's disqualification made by the defendants in this case fully satisfied the statutory requirements of section 455(e). At the time the waiver was made the defendants did not raise any question regarding the Code of Judicial Conduct. At this point in time, following their trial and conviction, they may not rely on the canons to challenge the validity of their knowing waiver.

3. Application of Section 455(b)(1).

Section 455(b)(1) mandates recusal where a judge "has a personal bias or prejudice concerning a party." It is the first in a series of specific statutory grounds for judicial disqualification, including financial interest or family relationship, which, in contrast to the more generalized prescription of section 455(a), may not be waived by the parties to an action. The term "personal bias or prejudice" used in section 455(b)(1) was taken directly from 28 U.S.C. §144,[11] and it is uniformly held that the case law under the latter section controls the interpretation of this clause. *See, e.g., United States v. Haldeman, supra*, at 133; *Davis v.*

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[11]See note 6, *supra*.

Board of School Commissioners, supra, 517 F.2d at 1052. The basic question presented by a charge of bias or prejudice under section 144 or 455 is whether the facts establish that the judge has in some manner demonstrated "a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U.S. 22, 33-34 (1921). Accordingly, the test for disqualification under section 455(b)(1) requires a showing of bias in fact rather than merely an appearance of impartiality as required under section 455(a). In addition, it is a well-established rule that the term "personal bias or prejudice" as used in the recusal statutes applies, by definition, only to "personal" as distinguished from "judicial" bias. The preeminent statement of this rule was made by Justice Douglas in *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966): "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *See United States v. Azhocar, supra* (slip opinion at 1898); *United States v. Haldeman, supra*, at 132.

The basic rationale of the rule lies in the distinction between the judicial opinions or biases developed by a judge during the course of court proceedings and personal opinions or biases which have their origins in sources outside the courtroom. The former are generally regarded as inevitable and, in fact, as essential to judicial decision-making. The latter form of prejudices, although they are also inevitable and necessary, are regarded as being potentially dangerous and disruptive of the objectivity and impartiality which are the essence of the administration of justice. The extrajudicial source rule has also traditionally served the more practical purpose of preventing parties from using the claim of partiality as a pretext for judge-shopping or challenging

adverse rulings of law or fact which should properly be addressed only through the appellate process.[12]

In their motion for a new trial the defendants asserted that, beyond creating a mere appearance of impartiality, the facts of this case support a finding that Judge Thompson harbored the kind of personal bias against them which is proscribed by section 455(b)(1) and which requires mandatory, non-waivable disqualification.This contention must be rejected, however, because the evidence presented by the defendants fails to show any actual bias or prejudice of extra-judicial origin sufficient to warrant recusal.

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[12]Although it is generally regarded as a maxim of recusal law, the "extra-judicial source" rule has not developed without some confusion and inconsistency. Some courts have suggested that there may be an exception to the rule for cases in which contacts during a judicial proceeding create such a degree of prejudice against a party or his counsel that impartiality is impossible. *See* Wolfson v. Palmieri, 396 F.2d 121, 124-25 (2d Cir. 1968); Rosen v. Sugarman, 357 F.2d 794, 798 (2d Cir. 1966). However, in view of the weighty policy considerations supporting the extra-judicial source rule, it would seem that such relatively unusual problems of egregious "judicial" bias should be addressed and resolved under the constitutional doctrines of due process or fair trial rather than in the context of the disqualification statutes. See note 13, *infra*.

Another element of confusion has arisen because of some inconsistency in the cases as to whether the "extra-judicial source" rule requires that the judge's bias be expressed in extra-judicial conduct, as opposed to statements or conduct in the courtroom. *See* Mayberry v. Maroney, 558 F.2d 1159, 1162 (3d Cir. 1977); Davis v. Board of School Commissioners, 517 F.2d 1044, 1052 (5th Cir. 1975); Tenants, etc. v. United States Dept. of H.U.D., 338 F.Supp. 29, 32-34 (N.D. Cal. 1972). Again, the underlying policy considerations of the rule should resolve this confusion. The purpose of the extra-judicial source requirement concerns the origin of the judge's bias rather than the place of its expression. Certainly, judicial rulings or comments on the evidence made during the course of a proceeding do not fall within the rule. However, if a judge's statements or conduct during a trial refer to or reflect bias or prejudice which arose outside of his judicial duties, then the extra-judicial source rule is satisfied and recusal may be required. Conversely, the fact that a judge has made statements outside the courtroom does not automatically mean that those statements reflect "personal" as opposed to "judicial" opinions, because the origin of the opinion may lie squarely within his judicial experience. *See* United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976).

There is no question that Judge Thompson holds, and held at the time of the trial of this case, a negative opinion about the defendant Joseph Conforte. In connection with the hearing on this motion, the judge candidly testified that he believes that Mr. Conforte is not a person of "good moral character," and that he has held this view "during all the time that I have had anything to do with Joseph Conforts." This opinion was expressed by Judge Thompson in his 1973 comments about the defendant in the bridge club letter and at the cocktail party. However, a simple negative opinion about a defendant does not automatically constitute "personal bias or prejudice" requiring disqualification of a judge.

In the instant case, it is clear that Judge Thompson's opinions about Mr. Conforte are not of extra-judicial origin. They arose, rather, out of numerous judicial proceedings before the judge over a 15-year period. In the course of those proceedings Judge Thompson learned of Mr. Conforte's prior conviction for extortion, of his activities as the proprietor of a house of prostitution, and of his recurrent difficulties with the Internal Revenue Service. Although the judge's personal knowledge of Mr. Conforte's activities may have been supplemented by facts gleaned from sources such as newspaper reports or general discussions of the defendant's reputation, it is impossible to say that the *origin* of Judge Thompson's impressions about Mr. Conforte is not inextricably bound up with the judicial proceedings over which he presided.

It cannot reasonably be argued that such opinions, formed by a judge on the basis of facts learned in prior proceedings, require disqualification. Such a rule would mandate that a defendant be entitled to a different judge each time he was tried. If this premise were carried to its final conclusion,

a judge who tried a case and placed a defendant on probation would not be permitted to sit at a probation violation proceeding. Clearly the law does not require such a result. *See United States v. De La Fuente*, 548 F.2d 528, 541 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977); *United States v. Montecalvo*, 545 F.2d 684, 685 (9th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977); *United States v. Haldeman*, *supra*, 559 F.2d at 133, n. 300.

Furthermore, even disregarding the fact of their judicial origin, the opinions held by Judge Thompson do not constitute an actual bias or prejudice against the defendant sufficient to meet the test for recusal under section 455(b)(1). Mr. Conforte's occupation and prior convictions are such as to make the judge's views about his moral character quite unexceptional, even in an era of increased ethical relativism. Indeed, if such an opinion were grounds for judicial disqualification, it is unlikely that a "qualified" judge could be found to decide this case. It is a well accepted maxim of law, often called the "rule of necessity," that if all judges are disqualified to hear a case, then none are disqualified. *See, e.g., Evans v. Gore*, 253 U.S. 245, 247-48 (1920); *Atkins v. United States*, 556 F.2d 1028, 1036 (Ct. Cl. 1977); *Dimes v. Grand Junction Canal*, 3 H.L.C. 759, 787-88, 10 Eng. Rep. 301, 313 (1852). While this rule may not be strictly applicable to the instant case, its pragmatic approach and the recognition that absolute neutrality is a fiction combine to militate against a new trial of the defendants.

To disqualify a judge for expressing the views held by Judge Thompson about Mr. Conforte would perpetuate "the myth that merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections." *In re J.P. Linahan*, *supra*, 138 F.2d at 652-53. The spirit of realism with respect

to the issue of judicial disqualification was recently expressed by the Third Circuit Court of Appeals where personal bias was defined as "an attitude toward petitioner that is significantly different from and more particularized than the normal, general feelings of society at large against convicted wrongdoers." *Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976). Judge Thompson's remarks about Mr. Conforte do not evidence such an attitude. *Cf. United States v. Nehas*, 368 F.Supp. 435 (W.D. Pa. 1973) (Personal bias does not include views based upon "attitudes common to the public generally").

Additional factors are present here which belie the defendants' charge of personal bias requiring recusal. Judge Thompson's attitude toward Mr.Conforte has been the same during all the time they had any contact with one another. Nonetheless, Judge Thompson ruled in favor of Mr. Conforte in unrelated matters in 1968 and 1970. Defendants do not claim that any hint of personal bias tainted those decisions. It is also significant that Judge Thompson presides over a single judge court, being the only federal district court judge in Reno. While distance is not an insurmountable barrier to recusal, the relative availability of other judges is a relevant and proper consideration in a decision regarding judicial disqualification. *School District of Kansas City, Mo. v. State of Missouri*, 438 F.Supp. 830, 835 (W.D. Mo. 1977); *United States v. Quattrone*, 149 F.Supp. 240, 242 (D.D.C. 1957).

For all of these reasons, it is this court's conclusion that Judge Thompson did not err in failing to disqualify himself under section 455.[13] The presumption is well established that "a judge approaches each new case with impartiality and conducts the case on its own merits from the evidence there presented." *United States v. Jeffers*, 532 F.2d 1101,

1112 (7th Cir. 1976). *See United States v. Patrick, supra,* 542 F.2d at 390; *Wolfson v. Palmieri,* 396 F.2d 121, 126 (2d Cir. 1968). The defendants have not overcome that presumption and they are not entitled to a new trial on the grounds of judicial bias or prejudice against them.

III.

The defendants' second major contention in support of the instant motion concerns the validity of their waiver of the right to a jury trial. They assert that Judge Thompson's failure to disclose the facts surrounding the bridge club incident and the cocktail party conversation and his failure to inform them of his opinion regarding the "Sullivan" returns render their waiver of a jury trial invalid, thus mandating a new trial. Obviously, this argument is closely related to the defendants' claim of personal bias; and, like that contention, it must also be rejected.

The right to trial by jury is guaranteed by Article III and the Sixth Amendment of the United States Constitution, as

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[13]In addition to their claim under section 455, the defendants contend that they should receive a new trial because Judge Thompson's bias against them deprived them of a fair trial in violation of the Due Process Clause of the Fifth Amendment. There is no doubt that the right to a fair and impartial judge who has not pre-judged a case is guaranteed by the Due Process and Fair Trial clauses of the constitution. *See* In re Murchinson, 349 U.S. 133 (1955); United States v. Brown, 539 F.2d (5th Cir. 1976); United States v. Scuito, 531 F.2d 842 (7th Cir. 1976). Furthermore, this constitutional right exists apart from the statutory disqualification provisions of sections 144 and 455 and may be invoked independently in situations where the statutes do not strictly apply. *See* United States v. Scuito, *supra,* at 845. For the most part, however, any bias or prejudice that would violate the Due Process or Fair Trial clauses would even more readily violate the statutes, and a separate consideration of the constitutional issues is not required. *See* United States v. Haldeman, *supra,* 559 F.2d at 130, n. 276. Therefore, the defendants' claims under the constitution are rejected on the same grounds as their statutory claims. They have failed to produce any evidence of bias sufficient to support a finding that they were deprived of due process or that they did not receive a fair trial.

well as by Rule 23(a) of the Federal Rules of Criminal Procedure.[14] There is little doubt that the waiver executed by the defendants in this case satisfied the requirements of Rule 23(a) since it was signed by the defendants with the approval of the court and the consent of the government. However, as the defendants correctly point out, waiver of the constitutional right to a jury trial must meet a high standard and must be "knowing and intelligent" in order to be valid. *See, e.g., Patton v. United States*, 281 U.S. 276, 312 (1930). They argue that the judge's failure to disclose his negative opinions precluded their making a "knowing and intelligent" waiver of a jury.

The error in the defendants' position lies in their assumption that non-disclosure of the judge's personal opinions deprived them of the information necessary to make an informed and intelligent jury waiver. In fact, the type of information required to make a proper jury waiver relates to the defendants' knowledge of their constitutional rights, not to the judge's innermost thoughts or out-of-court statements. Those are matters adequately treated by sections 144 and 455 of the Judicial Code.

The defendants rely primarily on the case of *United States v. David*, 511 F.2d 355 (D.C. Cir. 1975) in which a new trial was ordered because the trial judge did not sufficiently interrogate the defendant on the jury waiver issue. Their reliance is misplaced, however, because it ignores the reasons for the *David* decision. In that case, the defendant had a substantial history of psychiatric problems, the psychiatrist originally reported that the defendant was incompetent to

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[14]Rule 23(a) provides:

Trial by Jury. Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

stand trial, and counsel had expressed concern both as to the defendant's competency and his ability to knowingly waive his jury trial right. *Id.* at 361. For these reasons, the Court of Appeals demanded further inquiry into the waiver. None of those crucial facts is present in this case.

In addition, a closer reading of the *David* opinion reveals the true nature of the understanding required for a valid jury waiver. There, the waiver was insufficient because it was unclear "whether David understood that he had a right to be tried by a jury, whether he understood the difference between a jury trial and a non-jury trial and whether he was mechanically following his attorney's advice without having its basis explained to him." *Id.* at 362. In the present case, it is not only clear that the defendants understood their rights, but they and their attorneys testified that Mr. Conforte actively participated in the lengthy discussions preceding the waiver. Nor did Judge Thompson treat the waiver as a mere "matter of rote." *Patton v. United States, supra.* He explained the differences between a jury trial and bench trial, the burdens of proof, and the requirement of unanimity for a jury to convict. Judge Thompson also specifically raised the issue of his prior acquaintance with the defendant and his criminal record.

The jury waiver in this case passes even the most stringent constitutional scrutiny. As the Third Circuit stated in *United States v. Mitchell*, 427 F.2d 1280 (3d Cir. 1970):

> In view of the signed waiver and the colloquy with the court, the assertion that we are presented with a "silent record" cannot stand. The record is silent only to the extent that it fails to contain any suggestion that appellant's waiver was anything but voluntarily and intelligently entered. Appellant has never argued, or even intimated, that he was incompetent to execute a waiver, that his decision was induced by coercion or promises, . . . or that he did not appreciate the gravity of the offense charged. . . .

Id. at 1281-82 (citations omitted). The defendants' waiver of their right to a jury trial was completely voluntary and was knowingly and intelligently made. Their motion for a new trial on the ground of invalidity of the waiver must be denied.

Conclusion.

The motions of both defendants for a new trial are denied.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure this memorandum opinion shall constitute the court's findings of fact and conclusions of law.

IT IS FURTHER ORDERED that the clerk serve copies of this opinion by United States mail upon counsel for the parties appearing in this action.

IT IS FURTHER ORDERED that the clerk shall forward appropriate certified copies to the Court of Appeals for the Ninth Circuit.

Dated this 2nd day of August, 1978.

/s/ WARREN J. FERGUSON
United States District Judge.

APPENDIX B.

Judgments Below.

1. Judgment Affirming Convictions.

Under the Ninth Circuit's present practice, no judgment issues when an opinion is filed. The mandate serves as judgment, and in this case the mandate has been stayed to await action by this Court.

2. Order Denying Rehearing and Rejecting Suggestion for Rehearing En Banc.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Joseph Conforte and Sally Conforte, Defendants-Appellants. Nos. 77-3956, 78-3310.

Filed: Aug. 11, 1980.

Before: Kennedy and Tang, Circuit Judges, and Palmieri,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing, Judges Kennedy and Tang have voted to reject the suggestion for a rehearing en banc, and Judge Palmieri has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

APPENDIX C.

Opinion of Court Below in United States v. Sibla, as Originally Filed on March 3, 1980, and as Amended on April 28, 1980, One Day Before Its Opinion in the Present Case Was Filed.

[*Matter eliminated by the amendment of April 28 is marked off by thick brackets; new matter added by that amendment is printed in italics.*]

United States of America, Plaintiff-Appellee v. Richard R. Sibla, Defendant-Appellant. No. 78-1724.

United States Court of Appeals Ninth Circuit.

March 3, 1980.

Appeal from the United States District Court for the Central District of California.

Before WALLACE and HUG, Circuit Judges, and SOLOMON*, Senior District Judge.

HUG, Circuit Judge:

Richard R. Sibla appeals his conviction on two counts of willful failure to file an income tax return, in violation of 26 U.S.C. §7203. The sole issue on appeal is whether the district judge committed reversible error in denying Sibla's motion for recusal of the judge. We find no error, and we therefore affirm.

I.

Sibla chose to represent himself before the district court. At a pretrial hearing, the district judge noted that a discovery motion filed by Sibla related to a frivolous legal argument concerning the validity of the federal income tax scheme. The judge thoroughly admonished Sibla that similar chal-

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

lenges to the federal tax laws had been routinely rejected by the courts and that Sibla would be "in great trouble in connection with the defense of this case," if he relied on that argument.[1]

Alleging that the judge's remarks demonstrated prejudice, Sibla filed a motion and accompanying affidavit pursuant to 28 U.S.C. §144, requesting the judge to recuse himself. The district judge denied the motion on the ground that the

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[1]The full text of the statement of which Sibla complains is as follows:

> Mr. Sibla. I think it's probably appropriate for the Court to give expression to these views at this time, Mr. Sibla. The posture of this case, as viewed by the Court from the record now before it, seems very clearly to spell out on your part an intention to follow the exact course that has been followed by others similarly situated in other similar cases. As recently as one week ago, a defendant in an identical case—if it were not identical, it appeared in all material aspects to have been so similar as to be characterized as identical to yours—appeared in this court after the Court of Appeals had affirmed his conviction. The Court expressed to that defendant at that time that there had probably been something in the nature of, perhaps, a miscarriage of justice in the mild sentence that was imposed upon that defendant in that case. The Court expressed a hope that, perhaps, he and others similarly situated received some sort of message from the Court of Appeals when it declared the law in his case, as it has done in many other cases, and which declaration of the law applies exactly in your case. He should have been sent to jail, and anyone else who finds himself convicted of similar charges having asserted the kinds of defense he has asserted, and which the record indicates you are attempting to assert, ought to go to jail. It ought to be a lesson to you, to him, and to all other so-called protesting taxpayers that the frivolous position taken is one that will not be tolerated.
>
> Now, the Government has furnished everything to you that you are entitled to in your motion for discovery in this case, and it is a frivolous course of action on your part in which you ask that the Government, for example, answer the question as to whether the dollar symbol means exactly the same thing as it did in the first income tax act as passed by Congress. It is an affront to the government, to the Internal Revenue Service, and it is an affront to this Court, and you are on notice right now that you are going to be in great trouble in connection with the defense of this case if you persist in frivolity of this sort, quite apart from the merits of the lawsuit and quite apart from the question of whether you are either acquitted or convicted in this case.

affidavit was insufficient on its face because it did not state grounds for recusal.

Sibla waived his right to a jury trial, and the case was tried before the district judge largely on stipulated facts. As his sole defense, Sibla read a prepared statement in which he argued that the "warrants" or "credit" in which his wages were paid did not constitute taxable "dollars." Sibla was convicted on both counts.

Sibla contends on appeal that, even if the district judge properly denied his section 144 motion, the judge should have recused himself pursuant to 28 U.S.C. §455(a).

II.

This appeal raises several questions concerning the interrelation between sections 144 and 455 of title 28. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 455 provides in relevant part:

> (a) Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party. . . .

[1, 2] The test for personal bias or prejudice in section 144 is identical to that in section 455(b)(1), and the decisions interpreting this language in section 144 are controlling in the interpretation of section 455(b)(1). *United States v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978); *see United States v. Carignan*, 600 F.2d 762, 764 (9th Cir. 1979). Consequently, a motion properly brought pursuant to section 144 will raise a question concerning recusal under section 455(b)(1) as well as section 144.

[3] Sibla urges this court to find separate grounds for recusal under section 455(a) independent of the provisions of sections 144 and 455(b)(1). However, we have ruled that section (b)(1) simply provides a specific example of a situation in which a judge's "impartiality might reasonably be questioned" pursuant to section 455(a). *Olander*, 584 F.2d at 882. Sibla has not alleged grounds for recusal other than those relating to bias or prejudice stemming from the district judge's courtroom remarks. Therefore, the question before this court is whether the district judge erred in refusing to recuse himself for personal bias or prejudice pursuant to section 144 or section 455(a) & (b)(1). The same substantive standard will be applied to each section.

[4] Although the substantive test for bias or prejudice is identical in sections 144 and 455, the procedural requirements of the two sections are different. A brief discussion of those procedures is necessary for a full understanding of Sibla's rights on appeal in this case.

Section 144 expressly conditions relief upon the filing of a timely and legally sufficient affidavit. *See Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *United States v. Azhocar*, 581 F.2d 735, 738-40 (9th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454

(1979); *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). If the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges facts stating grounds for recusal under section 144, the legal sufficiency of the affidavit has been established, and the motion must be referred to another judge for a determination of its merits. *Azhocar*, 581 F.2d at 738.

[5, 6] Section 455, on the other hand, sets forth no procedural requirements. That section is directed to the judge, rather than the parties, and is self-enforcing on the part of the judge. *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). [Section 455 does not require the filing of an affidavit with the judge, or even a motion for recusal; indeed, the question of recusal under that section may be raised for the first time on appeal. *See id.; SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977).[2]] Moreover, section 455 includes no pro-

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[2][Our holding that the affidavit requirement of section 144 does not apply to section 455 is partially inconsistent with our holding in *Olander*, in which we affirmed the denial of a §455 motion on the basis of the legal insufficiency of the affidavit presented with the motion. 584 F.2d at 883. However, the decisions of the courts have varied widely on this issue. *See United States v. Wolfson*, 558 F.2d 59, 62 n.11 (2nd Cir. 1977) (question left open). *Compare Bennett*, 539 F.2d at 51 & n.5 (reviewing court evaluated merits of §455 question even though affidavit was insufficient) and *SCA Services*, 557 F.2d at 117 (§455 imposes no duty on the parties to seek disqualification) with *Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 437 F.Supp. 230 (D. Haw. 1977) (procedures under §144 apply to §455). The decisions of our own circuit may have contributed to the confusion. In *Blum*, decided after *Olander*, we disposed of a §455 question on the merits, even though no affidavit was filed as required by section 144. 597 F.2d at 938. Our decision today is intended to dispel the confusion, at least within our own circuit. Because we hold that a §455 issue may be raised for the first time on appeal, it necessarily follows that relief under §455(a) & (b)(1) is not absolutely precluded by a party's failure to file the motion and affidavit required by §144.]

vision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under section 455. that judge has a duty to recuse himself or herself. *See, e. g., Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 157 & n.10 (6th Cir. 1979).

[7] In light of the difference in procedures for sections 144 and 455, it is apparent that the two sections are not redundant but are complementary, even when the only ground for recusal alleged is bias or prejudice. A party desiring referral to a second judge upon a determination of legal sufficiency may invoke the provisions of section 144 by filing a motion under that section accompanied by a timely and sufficient affidavit. Such a motion should also prompt the judge to whom the motion is directed to determine independently whether all the circumstances call for recusal under the self-enforcing provisions of section 455(a) & (b)(1), a matter which rests within the sound discretion of the judge, *United States v. Schreiber*, 599 F.2d 534, 536 (3d Cir.), *cert. denied*, ...U.S....., 100 S.Ct. 86, 62 L.Ed.2d 56 (1979). Thus, section 455 modifies section 144 in requiring the judge to go beyond the section 144 affidavit and consider the merits of the motion pursuant to section 455(a) & (b)(1).

[8] The net result is that a party submitting a proper motion and affidavit under section 144 can get two bites of the apple. If, after considering all the circumstances, the judge declines to grant recusal pursuant to section 455(a) & (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to section 144. If that affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under section 144.

[9, 10] The failure of a party to inform the judge of the party's belief that grounds for recusal exist will signif-

icantly affect the appellate standard of review of the judge's failure to recuse himself or herself. Of course, if the motion and affidavit required by section 144 is not presented to the judge, no relief under section 144 is available. *E.g.*, *Blum*, 597 F.2d at 938. On the other hand, failure to move for recusal at the trial level does not preclude raising on appeal the issue of recusal under section 455. *See SCA Services, Inc.*, 557 F.2d at 117; *Schreiber*, 599 F.2d at 539 (Seitz, J., concurring). Nonetheless, if no motion is made to the judge, or if a conclusory motion is made without reference to specific facts allegedly creating grounds for relief, a party will bear a greater burden on appeal in demonstrating that the judge committed reversible error in failing to grant recusal under section 455. In those circumstances, the reviewing court must determine whether the district court erred in failing *sua sponte* to recognize obvious grounds for recusal under section 455 and to grant recusal pursuant to that section. *Cf. Schreiber* (using plain error standard).]

III.

[11] We note [,and Sibla apparently concedes,] that the district judge properly rejected Sibla's request for recusal pursuant to 28 U.S.C. §144. An affidavit filed pursuant to that section is not legally sufficient unless it specifically alleges facts that fairly support the contention that the judge exhibits bias or prejudice directed toward a party that stems from an extrajudicial source. *See Carignan*, 600 F.2d 762; *Azhocar*, 581 F.2d 735, 738-40. The motion and affidavit filed by Sibla contain only Sibla's conclusions and are devoid of specific fact allegations tending to show personal bias stemming from an extrajudicial source. Consequently, the district judge correctly rejected the motion and affidavit as legally insufficient. *See id.; Bennett*, 539 F.2d at 51.

The motion and affidavit filed by Sibla were adequate to trigger the judge's responsibility to view all the circumstances and exercise his discretion on the merits of the motion pursuant to section 455(a) & (b)(1), subject to full appellate review for an abuse of that discretion.[2] Although it appears that the judge in denying Sibla's motion solely on the grounds of insufficiency of the affidavit did not exercise his discretion pursuant to section 455, this does not constitute reversible error. The record clearly shows that no grounds for recusal under section 455 exist.

As with section 144, the provisions of section 455(a) & (b)(1) require recusal only if the bias or prejudice is directed against a party and stems from an extrajudicial source. *Carignan*, 600 F.2d at 764; *Davis*, 517 F.2d at 1052. In the district judge's statement to Sibla, he stated that a particular defense, challenging the monetary system and the federal tax laws, had been held to be meritless, and that Sibla would suffer adverse consequences if he relied solely on that defense. The district court correctly characterized Sibla's defense as legally frivolous. *See, e. g., Stuart v. Department of Finance and Administration*, 598 F.2d 1115 (8th Cir. 1979); *United States v. Wangrud*, 533 F.2d 495 (9th Cir.), *cert. denied*, 429 U.S. 818, 97 S.Ct. 64, 50 L.Ed.2d 79 (1976). [Because the judge's courtroom com-

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[2]*Sibla's motion to the district court did not expressly invoke the provisions of section 455. However, section 455 is self-enforcing on the part of the judge, and Sibla's claim of judicial bias or prejudice was sufficient to raise the issue of recusal under section 455(a) & (b)(1). Because the issue was raised in the district court, we need not decide whether grounds for recusal of a trial judge under section 455 may be raised for the first time on appeal. Compare United States v. IBM Corp., No. 79-3070, slip op. at 1428-29 (2d Cir. Feb. 25, 1980) (suggesting an implicit timeliness requirement in section 455) with SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (no timeliness requirement) and United States v. Schreiber, 599 F.2d 534 (3d Cir.), cert. denied, 100 S.Ct. 86 (1979) (using plain error standard).*

ments related to matters properly brought to his attention in the performance of his judicial duties, they were not extrajudicial and therefore did not create grounds for recusal under section 455. *See Azhocar*, 581 F.2d at 739-40.] *It was entirely proper for the district judge to inform Sibla of the manner in which frivolous claims would be viewed by the judiciary. See generally United States v. Driscoll, 612 F.2d 1155, 1156 & n.1 (9th Cir. 1980). The judge's comments did not create reasonable grounds for questioning his impartiality.*

The district judge did not err in denying Sibla's motion for recusal. The judgment of the district court is affirmed.

APPENDIX D.

Statutes and Canons of the Code of Judicial Conduct Involved.

1. Section 455 of Title 28, United States Code, provides in pertinent part as follows:

§455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding:

* * * * * *

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

2. Section 144 of Title 28, United States Code, provides as follows:

§144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

3. Section 7201 of Title 26, United States Code, provides as follows:

§7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

4. The pertinent portions of the Code of Judicial Conduct for United States Judges, as amended through March 1975 (69 F. R. D. 273, 275, 277, 279) provide as follows:

INTRODUCTION.

The Judicial Conference of the United States [28 U.S.C. §331] in April 1973 promulgated the *Code of Judical Conduct for United States Judges* to be applicable to all judges of the United States courts of appeals, the Court of Claims, the Court of Customs and Patent Appeals, the United States district courts, and the Customs Court, and to all bankruptcy judges and United States magistrates. The Code is based upon the *Code of Judicial Conduct* approved by the American Bar Association. To the extent possible the language of the American Bar Code has been retained.

The resolution of the Judicial Conference approving the Code for federal judges also provided that the adoption of the Code is not intended to "restrict any functions or priv-

ileges accorded by statute or resolution of the Conference to part-time magistrates, part-time bankruptcy judges, or special masters'' nor is it intended to ''abrogate or modify any conflicting provisions of statutes or resolutions of the Conference. Except as provided above [with respect to part-time judicial officers], to the extent that any part of the enumerated statutes or Conference action is less restrictive than the Code, *the latter will control.*'' (Emphasis added.)

* * * * * *

CANON 3

A judge should perform the duties of his office impartially and diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

* * * * * *

C. Disqualification

(1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * * * * *

D. (This provision which permitted a remittal of disqualification was deleted from the Code by the Judicial Conference in March 1975. Since that date a remittal of disqualification is not permitted under any circumstances.)

Supreme Court, U.S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

No. 80-399

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled to a new trial on the ground that the trial judge erred in failing to disqualify himself from hearing petitioners' case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 624 F. 2d 869. The opinion of the district court (Pet. App. A26-A59) is reported at 457 F. Supp. 641.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1980. A petition for rehearing was denied on August 11, 1980 (Pet. App. B1). The petition for a writ of certiorari was filed on September 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a non-jury trial in the United States District Court for the District of Nevada, petitioners were convicted on four counts of willfully attempting to evade and defeat federal employment taxes for the last quarter of 1974 and the first three quarters of 1975, in violation of 26 U.S.C. 7201. The district court sentenced petitioner Joseph Conforte to consecutive terms of five years' imprisonment and a $10,000 fine on each of the four counts. Petitioner Sally Conforte was sentenced to consecutive terms of four years' imprisonment and a $10,000 fine on each of the four counts, but the prison sentences were suspended in favor of a five-year term of probation, made conditional upon her filing complete and accurate tax returns in future years (Pet. App. A32-A33 n.3).

The court of appeals vacated Joseph Conforte's prison sentence on the last three counts of the indictment, vacated the special conditions on Sally Conforte's probation, and, as to each petitioner, vacated the fines imposed on the last three counts of the indictment. The court of appeals affirmed the convictions as so modified (Pet. App. A1-A25).

The facts pertinent to the disqualification issue are set out in detail in the district court's opinion (Pet. App. A27-A40) and are summarized in the opinion of the court of appeals (Pet. App. A14-A15). Petitioner Joseph Conforte (hereinafter "Conforte") was, at the time of trial, the owner of a legal house of prostitution in Storey County, near Reno, Nevada (Pet. App. A27). Judge Bruce R. Thompson, the trial judge, was the only district court judge sitting in Reno, Nevada (Pet. App. A55). At the time of trial Conforte had been involved in at least four previous proceedings involving criminal charges or civil tax matters, all of them known to Judge Thompson (Pet. App. A27). These were: (1) a 1960 conviction in Nevada state court resulting in a state prison sentence; (2) a federal tax conviction in the District of Nevada based on a guilty plea that Conforte unsuccessfully sought to withdraw while serving his sentence, the motion being heard and denied by Judge Thompson; (3) a 1968 trial before Judge Thompson on a charge of violating the Mann Act, 18 U.S.C. 2421, ending with the grant of a motion of acquittal by Judge Thompson; and (4) a 1970 civil action brought by the Internal Revenue Service for condemnation and forfeiture of trailer houses used in Conforte's prostitution enterprise, ending in a decision by Judge Thompson in Conforte's favor (Pet. App. A27). Apart from his appearances in court, Conforte's personal contacts with Judge Thompson consisted of little more than the exchange of greetings on several occasions (Pet. App. A27-A28).

Before the start of the trial in this case, petitioners sought to waive their right to a jury trial. Upon hearing this application, Judge Thompson first made certain that petitioners' waiver was knowingly and intelligently made. He then put the following statement on the record with

respect to his knowledge of Conforte's criminal record, and received the following answers from petitioners and their counsel (Pet. App. A28-A30, n.2):

THE COURT:

> There is something else involved in this waiver of jury trial that should be brought out in the open. I am aware of Mr. Conforte's criminal record. Some years ago I passed upon a postconviction remedy motion that was filed on behalf of Mr. Conforte. I am aware of two trials in this court which involved Mr. Conforte, one in which I believe he was charged with a violation of the White Slave Traffic Act, and another which involved an effort to abate the operation of the so-called Mustang Ranch for Internal Revenue violations.
>
> Facts of that nature, if known to a juror prior to impanelment of the jury, would be a basis for disqualification of a juror. If I am going to be the trier of the facts in this case, I can't eliminate the knowledge I already have. So I want you to know—and you know what I know—that if I am going to preside over this trial without a jury, you will have to waive any basis of disqualification because of my prior knowledge of facts concerning Mr. Conforte primarily; I don't know much about Mrs. Conforte.
>
> Do you understand what I have told you?

MR. CONFORTE:

> Yes, sir.

MRS. CONFORTE:

> Yes, sir.

THE COURT:

Do you agree that I am not disqualified to try the case?

MR. CONFORTE:

I agree, sir.

THE COURT:

Do you, Mrs. Conforte?

MRS. CONFORTE:

Yes.

THE COURT:

Mr. Maxwell, is this proposed waiver of a jury trial with your approval and after full conferences and explanations with your client?

MR. MAXWELL:

[Mrs. Conforte's attorney]: It is, your Honor.

THE COURT:

Is that true of you, also, Mr. Brown?

MR. BROWN:

[Mr. Conforte's attorney]: Yes. We have discussed it for days, your Honor.

Judge Thompson accepted the waiver and tried the case without a jury. At the conclusion of the trial, he acquitted petitioners on the first six counts of the indictment[1] and convicted them on the remaining four. After filing notices of appeal, petitioners filed a motion for a new trial. The asserted ground was "newly discovered evidence" indicating that Judge Thompson had been personally biased and prejudiced against them at the time of trial (Pet. App. A32). The court of appeals remanded the case to permit consideration of the motion and assigned Judge Warren J. Ferguson of the Central District of California to hear the motion.

Judge Ferguson conducted an evidentiary hearing at which the following evidence, as summarized by the court of appeals (Pet. App. A14), was adduced. In 1972 Conforte submitted an application to the American Contract Bridge League's Reno Unit, of which Judge Thompson was then president. Members of the unit wished to reject his application because of his felony convictions and his proprietorship of a house of prostitution. At their request, Judge Thompson wrote the national headquarters of the Bridge League to ask whether the unit was permitted to reject Conforte's application.[2] The national headquarters responded that it could, and Judge Thompson wrote a rejection letter to Conforte on court stationery.

---

[1]These counts charged petitioners with filing false employers' quarterly tax returns for six quarters in 1974, 1975, and 1976, in violation of 26 U.S.C. 7206(1).

[2]In the letter, Judge Thompson observed that "Mr. Conforte has twice been convicted of felonies, extortion and income tax evasion and has served terms in state and federal penitentiaries. He is a notorious bawdy house keeper and is presently engaged in that business in nearby counties" (Pet. App. A35 n.4).

In 1973 Judge Thompson attended a cocktail party following a university of Nevada football game. A discussion of fund-raising for the team occurred, and Conforte was mentioned as a possible contributor. Judge Thompson opposed accepting a contribution from Conforte because he ran a house of prostitution. He also stated that the only problem with one member of the athletic staff was that he was a good friend of Conforte, who, the judge observed, was "not good for Reno."[3]

After the hearing, Judge Ferguson denied petitioners' motion for a new trial (Pet. App. A26-A59). The court of appeals affirmed. In affirming, the court held that the motion for a new trial was properly denied for three reasons: first, to the extent that it rested on the bridge club incident, the motion was properly denied as untimely (Pet. App. A14-A16); second, the remarks made by Judge Thompson at the university function did not demonstrate reasonable grounds for finding that the judge could not try the case fairly (Pet. App. A16-A20); and third, petitioners' waiver of a jury trial, permitting their trial by Judge Thompson despite his knowledge of Conforte's criminal record, was knowingly and intelligently made (Pet. App. A20).

ARGUMENT

Petitioners advance four contentions in support of their argument that they were entitled to a new trial because of the trial judge's failure to disqualify himself. All are without merit, and none raises an issue as to which the decision below squarely conflicts with a decision of this Court or of any court of appeals.

---

[3]Judge Thompson testified that his low opinion of Conforte's character was based on his knowledge of Conforte's criminal record (Deposition of Judge Thompson at 32; see also *id.* at 20).

1. Under 28 U.S.C. 455(a), a judge is obligated to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," and 28 U.S.C. 455(b) states specific circumstances in which disqualification is obligatory, including the existence of "personal bias or prejudice concerning a party." Pursuant to 28 U.S.C. 455(e), a judge may accept a waiver of disqualification from the parties if disqualification would be based on Section 455(a) and if the waiver "is preceded by a full disclosure on the record of the basis for disqualification"; but no such waiver is permitted if the ground for disqualification is one of those specified in Section 455(b).

Petitioners contend (Pet. 14-15) that, even assuming that Section 455(a) was the only ground for disqualification, no waiver of disqualification was permissible here because the 1977 version of Canon 3 of the *Code of Judicial Conduct for United States Judges* in effect at the time they made their new trial motion (Pet. App. D2-D3) imposed disqualification obligations similar to those in 28 U.S.C. 455, but precluded waivers under any circumstances. They contend that the Code, rather than the statute, controlled disposition of their motion.

As the district court reasonably observed, however (Pet. App. A49), "the disqualification provisions of the Code of Conduct can only be construed as establishing a standard for judicial behavior rather than as imposing a mandatory duty enforceable after the fact by the reversal of otherwise proper judicial decisions." The Code thus did not replace Section 455 as a basis for obtaining a new trial. But in any event, Canon 3 of the Code was amended in 1979 to bring it into conformity with Section 455, and it now permits a waiver of disqualification where, as here, the only ground is that a judge's impartiality might reasonably be

questioned. *Code of Judicial Conduct for United States Judges*, Part I at I-14, I-18d. Thus petitioners' contention has no continuing significance and does not warrant further review.

2. Petitioners also contend (Pet. 15-18) that their Section 455(e) waiver was invalid because Judge Thompson did not, at the time of the waiver, inform them of the bridge club letter he had written or his remarks at the university function. But as both courts below correctly held (Pet. App. A20, A47-48), petitioners were on notice that Judge Thompson was aware of Conforte's prior encounters with the criminal justice system. Because his knowledge of that record was the basis for his negative views towards Conforte, petitioners had sufficient information to make the waiver decision. Judge Thompson revealed that Conforte's prior brushes with the criminal justice system and the Internal Revenue Service had remained in his memory, and it should surely have occurred to petitioners that such knowledge would not induce a favorable view of Conforte's character. Moreover, as the district court observed (Pet. App. A47-A48), "full disclosure" cannot reasonably be construed as imposing on a judge "the impossible task" of reciting remarks he does not recall having made. In any event, this fact-bound issue does not warrant further review.

3. Petitioners also contend (Pet. 19-22) that the courts below erred in finding that Judge Thompson did not have a personal bias or prejudice concerning Conforte within the meaning of Section 455(b)(1)—a ground as to which the statute permits no waiver. This contention rests on a misconstruction of the term "personal," which, as used in Section 455 (or the similarly-worded 28 U.S.C. 144), stands "in contrast with judicial; it characterizes an attitude of extra-judicial origin * * *." *Craven* v. *United States*, 22 F. 2d 605, 607 (1st Cir.), cert. denied, 276 U.S.

627 (1927). Accord, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Haldeman*, 559 F. 2d 31, 132, 135-136 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). As the district court properly found (Pet. App. A53), Judge Thompson's opinion of Conforte was derived from the facts disclosed in the various judicial proceedings in which Conforte had appeared before him. Furthermore, "personal bias" has been defined as "an attitude toward [a litigant] that is significantly different from and more particularized than the normal, general feelings of society at large against convicted wrongdoers." *Mims* v. *Shapp*, 541 F. 2d 415, 417 (3d Cir. 1976). Petitioners failed to show that the attitude of Judge Thompson, who knew from official proceedings that Conforte operated a house of prostitution and was a twice-convicted felon, was different from popularly held views concerning persons with criminal records engaged in that trade.[4] Accordingly, the courts below were correct in holding that Judge Thompson had no "personal bias or prejudice" in the statutory sense concerning Conforte.

---

[4]Petitioners also contend (Pet. 21) that the "savage 20-year sentence imposed on Joseph Conforte * * * constitutes convincing evidence of Judge Thompson's personal bias and prejudice." But as the court of appeals observed (Pet. App. A21), "the record makes clear that the sentences were imposed to test [petitioners'] right to file *Sullivan-Garner* returns and not because of any personal bias against them." Furthermore, as the following colloquy from Judge Thompson's deposition shows, it was apparent to all concerned that the 20-year sentence was not meant to stand (Deposition of Judge Thompson at 25-26):

> Q. [by Conforte's attorney] At the time the additional fifteen-year sentence was imposed, was it your intention, sir, that if the sentence was affirmed on appeal that you would reduce the sentence if a subsequent motion to modify was brought?
>
> A. Yes. I think that is probably the only time * * * that you ever heard a judge preface a sentence with a statement to the defendant that he had rights under Rule 35 to move to modify.

4. Petitioners finally contend (Pet. 23-24) that the courts below erred in holding that the motion for a new trial, insofar as it was based on the "newly discovered" bridge club letter written by Judge Thompson, was untimely; and they assert a conflict with decisions of other circuits on the question whether a disqualification motion based on 28 U.S.C. 455 and alleging personal bias or prejudice is subject to any timeliness requirement.

As petitioners point out, Section 455 contains no express timeliness requirement. The "personal bias and prejudice" subsection of that provision, however, is *in pari materia* with 28 U.S.C. 144 (*In re International Business Machines Corp.*, 618 F. 2d 923, 928 (2d Cir. 1980), citing *Davis* v. *Board of School Commissioners of Mobile County*, 517 F. 2d 1044, 1052 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976)); and Section 144 *does* require that a motion to disqualify be timely made.[5] This timeliness requirement has, accordingly, been declared applicable to a personal bias claim under Section 455 as well. *In re International Business Machines Corp.*, *supra*, 618 F. 2d at 932; *United States* v. *Daley*, 564 F. 2d 645, 651 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978). See also *United States* v. *Patrick*, 542 F. 2d 381, 390 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). As the district court noted (Pet. App. A44 n.7): "[To conclude otherwise] would allow any litigant to evade the procedure established in section 144 by simply ignoring that section in favor of section 455. The result would be to effectively repeal section 144 and render it meaningless." See *Rousell* v. *Tidelands Capital Corp.*, 438 F. Supp. 684, 691 (N.D. Ala. 1977). See also *Johnson* v. *United States*, 318 U.S. 189, 201 (1943).

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[5] The text of 28 U.S.C. 144 is reprinted at Pet. App. D1-D2.

The cases on which petitioners rely (Pet. 23) are all distinguishable. In three of them, *Potashnick* v. *Port City Construction Co.*, 609 F. 2d 1101 (5th Cir. 1980), cert. denied, No. 79-1522 (Oct. 6, 1980); *SCA Services, Inc.* v. *Morgan*, 557 F. 2d 110 (7th Cir. 1977), and *United States* v. *Amerine*, 411 F. 2d 1130 (6th Cir. 1969), the claims concerned the relationship of the judge or his relatives to one of the parties, not claims of personal bias. No overlap between Section 144 and Section 455 was involved, and thus the question of the interaction between those provisions was not there presented. In the other two cases, *Davis* v. *Board of School Commissioners of Mobile County*, *supra*, and *United States* v. *Brown*, 539 F. 2d 467 (5th Cir. 1976), claims of bias were involved but no timeliness issue was presented. In Davis, which affirmed the trial judge's denial of the motion to disqualify, the motion had been made early in the proceedings and was clearly timely. In *Brown*, the motion, although made years after trial, was filed promptly once the facts relating to the trial judge's apparent bias were made known to the defendant. In the present case, by contrast, Conforte, although having personal knowledge that Judge Thompson had been involved in the rejection of his bridge club application, not only did not move to disqualify Judge Thompson, or at least remind him of the incident, but rather asked the judge to try the case without a jury. The present case thus clearly did present a timeliness question, which the courts below properly resolved against petitioners.[6]

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[6]Petitioners argue (Pet. 23) that the failure of Congress, despite the Justice Department's recommendation, to insert a timeliness requirement into Section 455 when it amended that section in 1974 indicates that Congress wished to allow Section 455 disqualification motions to be made at any time. Under old Section 455, however, courts assumed a timeliness requirement. See, *e.g.*, *Zovluck* v. *United States*, 448 F. 2d 339, 343 (2d Cir. 1971), cert. denied, 405 U.S. 1043 (1972). Thus, Congress' failure to act on the Justice Department's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1980

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suggestion could just as reasonably be construed as evidence that Congress was satisfied with the then-existing judicial gloss on Section 455 and saw no need for additional legislation.

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